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Supreme Court of the United States

OCTOBER TERM, 1961

No. 518

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW ROCHELLE and Ano.,

Petitioners,

—against—

LESLIE TAYLOR and KEVIN TAYLOR, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW ROCHELLE and ANO.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Board of Education of the City School District of New Rochelle, an incorporated municipality of the State of New York (New York Education Law Section 2502 (1)) prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in this cause on August 2, 1961, affirming by a divided court (Moore, J. dissenting), a decree of the District Court for the Southern District of New York (Kaufman, J.).

Opinions Below

The first opinion of the District Court is reported 191 F. Supp. 181. Two other opinions of the District Court, one dealing with the plan (182a), and the other denying a stay (166a) are unreported and printed in the Appendix of the record below. The majority and minority opinions of the Circuit Court of Appeals, not yet reported, are appended to this petition. (App. A 1-35)* Also appended is the opinion of the Commissioner of Education of the State of New York rendered in a proceeding instituted against Petitioner in 1960 by three of the plaintiffs herein pursuant to Section 310 of the New York Education Law. (App. C 36-42)

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on August 2, 1961. The jurisdiction of this Court is invoked under Section 1254(1) of the U.S. Judicial Code (62 Stat. 928).

The Questions Presented

A. Is This Truly a Segregation Case and Have Plaintiffs Been Deprived of a Constitutional Right?

This case involves the validity of a pupil assignment regulation as applied in the public school system of the City of New Rochelle, New York. New Rochelle operates a well integrated bi-racial school system. There is not a single all Negro or all white school in the City. Children are assigned to a school on the basis of residence alone. No child has been excluded from any school because of race. Out of 15 schools in the system the

* "App." refers to Appendix to this Petition.

lower courts found a "racial imbalance" in one, and called it "segregation". The Court concludes that "the right to the equal protection of the laws guaranteed by the Fourteenth Amendment" has been denied to plaintiffs. (133a)*

The decision rests upon the finding that once upon a time—thirty years ago—the Board of Education created a segregated school. (136a). There is no finding that the Lincoln District as presently defined is segregated.[1] The year 1930 is confused with 1960 and motive is made the basis for proscribing the present setup.

The lower courts reached the conclusion that the number of Negroes attending Lincoln School in 1960, rather than the number of eligible whites residing in the district, was decisive, and that the result is attributable to pre-1949 policies. There is no finding to substantiate the causal relationship between the original 1930 district and the 1960 boundary lines and a pupil assignment regulation in effect since 1949. On the contrary, two major findings hereafter referred to show a break in the chain of causation. Fur-

* Unless otherwise noted references are to the Appendix Record in the Court of Appeals.

[1] The Commissioner of Education of the State of New York on the same record held in May, 1960 that Lincoln District as presently laid out was not segregated and did not violate plaintiffs' constitutional rights. (App. C). The District Court recognized that the 1960 boundary lines of Lincoln did not create a segregated school, else the obvious remedy would have been to direct the Board to redraw the lines. See Judge Moore's critical and unassailable analysis of the record, showing that the finding of gerrymandering in 1930 was based upon the conclusory statement of a witness who professed no knowledge of the facts. (App. A, p. 21). Thus, a school district has been held in violation of the Constitution on testimony having no probative value and on nothing more substantial than gossip.

ther, the conclusion below erroneously equates the racial complexion of school attendance with the racial ratio of the residents in the district. The Board in defining the boundary lines of a school district and making residence the basis of pupil assignment obviously cannot be held responsible (and found guilty of depriving plaintiffs of their constitutional rights) for the failure of white children resident in the district to attend the public schools.

The plaintiffs offered no proof and the Court made no finding as to the number of white and Negro children living in the Lincoln District as laid out in 1960. The same is true as to any relevant earlier date. The District Court assumed (contrary to the established rule that there is a presumption of the existence of a state of facts to sustain constitutionality, *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185) that the 1960 district was gerrymandered with respect to color.[2] Since the record is barren of any proof as to number of white and Negro residents in the district the judgment must be sustained, if at all, on the theory that a school attended by 94% Negroes is segregated in a constitutional sense.

The decision thus presents the question whether, absent a finding of the number of white and Negro children living in the Lincoln District, as currently laid out; absent a finding that the rule of residence

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[2] The fact is that a large number of white children living in the district attend non-public schools. Affidavit of Mr. Merryle Rukeyser, President of the Board, submitted in support of application for stay, shows 106 white children now living in the district but attending parochial or private schools. (App. G. p. 48) If this number is added to the 29 whites in attendance the result is 135 or an eligible white enrollment in Lincoln School as of October, 1960 of 23%. These figures destroy any inference of deliberate intent on the part of the Board to maintain a "segregated school".

was unequally or discriminatorily applied to the Lincoln District; absent a finding that a Negro child was excluded from any school in New Rochelle on the ground of race—may the existing school district be struck down as unconstitutional because of pre-1949 sin and the racial attendance ratio in the school in 1960? Should not the validity of the condemned school be determined by eligibility to attend based on district lines fixed by the Board rather than the chance enrollment over which the Board has no control?

The Court of Appeals pointing to a finding that around 1930 the School Board "had deliberately created and maintained Lincoln School as a racially segregated school" deemed it the "crucial finding * * * supported by the record". This would make it appear that the appeal involves a review of a question of fact. Nothing could be farther from the case. Obviously the phrasing of the finding is not determinative, nor does it bar a review of the question whether the school is "segregated" in a constitutional sense.

The so-called crucial finding is in two parts and the Court's reference omits the second part. Both must be read together. The finding is that "prior to 1949" the Board created a segregated school, *and* that the Board's conduct "since 1949 has been motivated by the purposeful desire of maintaining the Lincoln School as a racially segregated school" (133a-134a). The first part avoids the crucial question whether the school was segregated in 1960. The second part is general and conclusory and its main ingredient is

motive. There is no finding of a single fact to support such inference.[3]

The finding is further deficient in a material respect. On its face it reveals an hiatus in point of time. It ignores the year 1949. In that year the Board of Education adopted and put into effect a plan intended to correct the pre-existing situation. This appears from two other major findings. The District Court found that the Negro attendance in the school *before* 1949 was due *not* to gerrymandering alone, but also to a permissive transfer policy which allowed a substantial number of white children living in the Lincoln District to transfer to other schools (138a).[4] The District Court then made the significant finding that in January, 1949 the Board ended the permissive transfer policy and adopted a regulation that every child must attend the school lying within the district in which he resides (139a). This regulation (Ex. M, App. F), in effect a plan of desegregation, was a voluntary act of the Board of Education taken five years before this Court's decision in *Brown*.

This presents a basic question as to whether the Board's 1949 plan meets constitutional standards regardless of the past. Was it not a reasonable means to undo the earlier wrong? The Court of Appeals said that it resulted in the attendance of only "a

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[3] In constitutional cases this Court will always examine the evidence to see whether it furnishes a rational basis for condemning official acts. See *In re Saucier*, 360 U.S. 622.

[4] The District Court specifically found that in 1949, "106 [white] children residing in the Lincoln District" were allowed to transfer out. This finding inherently contradicts the finding of gerrymandering. Under the Board's 1949 resolution these children were assigned back to Lincoln. (138a)

small number of white children" at the school. (App. A, p. 5). It overlooks the number of white children eligible to attend.[5] It does not tell how many white children are needed to avoid condemnation. The Court holds as a matter of law that the "racial imbalance" is unconstitutional because it "approximates closely the harmful conditions condemned in the *Brown* case". (App. A, p. 7). What is the constitutional balance? Should not the pre-*Brown* voluntary plan of the Board of Education be judged by standards no different from those applied in the true segregation cases?[6] In all such cases where prior sin was clearly established, a particular white and Negro mix was not a requirement of a plan of desegregation.

B. Has Petitioner Been Accorded Due Process?

There is a substantial variance between the issue presented in the complaint and the basic issue decided. The validity of the pre-1949 acts of the Board was not challenged or litigated. The complaint does not charge "gerrymandering" nor mention any unlaw-

[5] The opinion states "that a small number of white children were retained in the district." This is a patent error since there is no evidence in the record or finding as to the number of white or negro children living in the district either in 1949 or 1960.

[6] The principle of law applied here would permit the court, at the instance of a Negro pupil, to alter the plan of desegregation voluntarily adopted in the City of Washington, D.C. in 1954. That plan is precisely the same as New Rochelle's 1949 plan. The City of Washington is divided into neighborhood school zones for pupil assignment purposes. The 1960 published report of the Superintendent of Schools of Washington, D.C. shows that since desegregation 11 out of 60 schools in that city are all Negro; and in 43 schools the white enrollment is less than 10% (Ex. 26). If prior intent in conjunction with school attendance ratios govern, the Washington plan is invalid upon the ground that the racial mix is far worse than in New Rochelle.

ful act prior to 1949. It is centered upon the contemporary situation. The sole grievance raised in the complaint is that a current rule of school admission based upon residence is unconstitutional when applied to an area populated by Negroes. (Par. Fifth of complaint; 2a). The Petitioner was never apprised of, nor given the opportunity to meet the charge that a racially segregated school was created years ago. Yet the decision rests on this crucial finding. Does the finding of guilt for a charge never made meet constitutional standards of justice and due process?

The decision below raises the following subsidiary questions:

1. Were the determinations of Petitioner and the State Commissioner of Education sustaining the validity of the 1960 boundary lines of the Lincoln District in the context of the predominant Negro population in 1960 so patently without reason as to be demonstrably illegal?

2. (a) Does *Brown* v. *Board of Education*, 347 U.S. 483 support the District Court's doctrinaire holding that the presence of only 6% whites denies "to Negro children the opportunities for a full and meaningful educational experience guaranteed to them by the Fourteenth Amendment" (154a) and the majority view of the Court of Appeals that the 94% Negro enrollment "approximates closely the harmful conditions condemned in the *Brown* case" (App. A p. 7)?

(b) Can a holding of unconstitutionality condemning governmental action be sustained in the absence of a factual finding of harm?

(c) Since "harm" is the major premise of the decision below, will the federal courts become the arbiters of sound educational practices?

3. Does the plan decreed by the District Court (affecting as it does one geographic enclave in the City singled out because of its racial complexion) conform with constitutional standards of the equal protection clause of the Fourteenth Amendment?

4. Do the plaintiff children none of whom attend the public schools, and who were not in being before 1949 have a standing to raise the constitutional issue decided?

5. Since plaintiffs elected to appeal to the State Commissioner of Education, should not the federal courts sitting in equity have declined jurisdiction until after plaintiffs had exhausted the judicial and adequate review provided in such case by Article 78 of the Civil Practice Act of New York? (See rule of *Alabama Commission* v. *Southern R. Co.*, 341 U.S. 341). This issue was raised in the Answer (10a-11a).

The Constitutional Provisions and Regulations Involved

The case involves the Fourteenth Amendment to the Constitution of the United States (App. B). It also involves a pupil assignment regulation of the Board of Education of the City of New Rochelle adopted January 11, 1949, and the resolution of the Board establishing elementary school attendance districts in effect in October, 1960. (App. D, E)

Statement of the Case

Public education is a state function in the State of New York guaranteed by its Constitution (Art XI), and the Petitioner is an agency of the State exercising powers delegated to it by the Legislature (Art. 51, N.Y. Ed. Laws).

This action was brought on behalf of eleven Negro children, *none of whom attended the public schools,* (8a) to declare a school assignment regulation described as the "neighborhood school" rule unconstitutional. New Rochelle does not maintain separate schools for white and colored, and there is not a single all Negro school in the City. There is no claim nor proof that any child was excluded from any school because of his color.

The School System

The City School District is co-terminus with the boundaries of the City. The population of the City

is over 75,000. The school system consists of 12 elementary schools and 3 secondary schools with a total school enrollment of 11,681. For attendance purposes the City is divided into zones or districts established by Board resolution pursuant to subdivision 4(d) of Section 2503 of the New York Education Law, empowering boards of education to "determine the school where each pupil shall attend". Each of the 12 elementary schools lies in the approximate geographic center of the district. This is manifest from Exhibit R--the official school map showing the outline of each district in October, 1960. (App. E)

The criteria employed in defining district lines are proximity to the school, safety factors and school size (69a). This is commonly accepted and standard school practice, and has received legislative and judicial sanction in the State of New York and elsewhere (112a; New York Ed. Law § 1801 (2); *Matter of Board of Education* v. *Allen*, 6 App. Div. (2) 316, aff'd. 6 N.Y. (2d) 871; *Henry* v. *Godsell*, 165 F. Supp. 87 (E.D. Michigan)). Under a regulation promulgated by Petitioner on January 11, 1949 and in effect ever since, children are required to attend the school of the district in which they live (App. D).

District lines in New Rochelle are not immutable. They have been modified over the years to meet changing conditions. Between 1930 and 1960 the City has grown, there has been a shift in population and the Negro population has increased by more than 50% (Census figures-Ex.T). Three schools were opened in newly developed areas, other schools were enlarged or rebuilt, and one school was closed. This necessitated adjustments in existing boundary lines through-

out the City. Thus the 1960 lines of Lincoln District are substantially different from what they were in 1930 (Ex. L).

The Shape of the Lincoln District in 1960

A glance at the map, Exhibit R, (App. E p. 44) discloses that the Lincoln District is compact and regular in shape—and not abnormal as compared with other elementary school districts in the City. It is basically a rectangle with two slight contours in the lower sector due to two cul-de-sacs. The school is located in the geographic center of the district and meets the standards of convenience and safety of young children. The number of white children living in the district is several times the number of those who attend the school.

Racial Distribution in the New Rochelle Public Schools

The Negro population (13.6%) is concentrated in a narrow belt in the south central part of the City. (136a). The chart, Exhibit M, shows the racial distribution of children in the public schools. (App. F p. 46). It demonstrates a well integrated school system. 76.38% of all Negro children attending public schools are scattered among schools other than the Lincoln School. The City has enjoyed a national reputation for good race relations.

The percentage of Negroes who attend any particular school varies in accordance with the residential pattern. The District Court found "The Lincoln

School District lies in the center of this Negro area" and that five other elementary school districts bordering Lincoln "contain a substantial Negro population." It is only natural therefore to find a large percentage of Negroes in attendance at these schools. The Negro enrollment in Lincoln is 94% and in the adjacent schools the percentage ranges from 17% to more than 50% (136a). None of these statistics, however, tells how many Negro and white children reside in any one district and are eligible to attend the public schools. Large numbers of children in New Rochelle attend parochial and private schools. Plaintiffs offered no evidence as to the racial make-up of the Lincoln District—and there is no finding on this crucial fact.

The Constitutional Claim Raised by Plaintiffs

The complaint does not charge purposeful discrimination or unequal application of the laws. It alleges that the basis for admission to the public schools in New Rochelle is founded upon residence, and characterizes the rule as the "neighborhood school policy" (herein called NSP). It goes on to say that when applied to a Negro district the school necessarily reflects "the segregated pattern of the neighborhood". Plaintiffs contend that if the result is a school attended "only by Negro children", such school becomes "a segregated school" and offends the Constitution. (Compl. Par. Fifth; 2a). There is no averment of intent to create an all Negro school; no claim that the plaintiffs have been denied admission to any school because of their race.

The attack is centered upon *one* school out of New Rochelle's 15 schools, namely the Lincoln Elementary School. It is alleged that this school is "attended only by Negro children" (Pars. Fifth & Sixth Compl., 2a-4a). There is no averment that the boundary lines of the Lincoln District were ever deliberately drawn to create a racially segregated school. There is no claim that the number of Negro children enrolled in the Lincoln School in 1960 has any relevance or causal relation to any pre-1949 acts of the defendants. The complaint, drawn by counsel skilled in segregation litigation, carefully avoids such charge. The explicit charge is "The utilization [in 1960] of the neighborhood school policy in such area [where Negroes reside] must, *of necessity,* produce segregated schools." (Compl. Par. Fifth; emphasis supplied).

Thus the complaint does not attribute the Negro enrollment in the Lincoln School to purposeful action of the Board, but rather that it is an indirect consequence of the application of "the 'neighborhood school policy' practiced by the Defendants". It is admitted that the NSP rule of school assignment applies equally throughout the City. The nub of the complaint is the impact of the rule upon a Negro residential area. The grievance alleged in Paragraph Tenth of the Complaint is that plaintiffs "are injured by the refusal of the Defendants to cease operation of a 'neighborhood school' policy" in violation of "the rights of the Plaintiffs * * * secured to them by the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution." (5a)

The Decision of the Commissioner of Education of the State of New York

The Commissioner is a constitutional officer and the highest educational authority in the State to whom Petitioner is subordinate. (N.Y. Const. Art. V, §4) He exercises judicial functions and is empowered to review actions of a board of education (§310 N.Y. Ed. Law). In 1960, before instituting this suit a number of the plaintiffs herein brought a class proceeding before the Commissioner to review the validity of the Lincoln School District. Plaintiffs raised the identical constitutional issue presented herein and after a plenary hearing the Commissioner denied the claim.

The Commissioner found that the 1960 district lines of Lincoln shown on Exhibit R (App. E) observed sound educational standards and were not "adopted as a device to circumvent the law" (App. C pp. 37-42)

The Decree

The decree changes the eligibility rule for school admission for children living in the geographic area currently delineated as the Lincoln District. It freezes the existing boundary lines and robs the Board of power delegated to it by the Legislature to readjust district lines to meet changed conditions. It conflicts with the Board's resolution of January, 1949 designed to abolish earlier abuses by requiring all children to attend the school of residence. It reverses the determination of the Commissioner of Education that Petitioner was under no constitutional duty to send children out of their residence district merely because

"the preponderance of children who would normally attend the neighborhood school happened to be white or Negro" (App. C p. 41).

The decree voids the NSP rule for one district for no reason other than to achieve a different racial balance in one school in the system. By reserving jurisdiction over the case the Federal Court has assumed continuous authority to determine each year what racial mix meets its notion of balance to effect a "meaningful educational experience."

The Prohibition Against a New School for the Lincoln District

This lawsuit has its genesis in a decision of the Board of Education to build a new school in the Lincoln District, and among the principal items of relief sought in the complaint is to enjoin Petitioner from building this school (Compl. Par. Eighth, p. 5a; Item D, Prayer for Relief p. 6a). A bond issue of $1,300,000 to cover the cost of the school has been approved by public referendum (Ex. N). The District Court has expressly warned Petitioner that the rebuilding of the Lincoln School will be held not to be "good faith compliance with an obligation to desegregate" (155a-156a). Petitioner may not proceed with the construction of a badly needed school except at the peril of a contempt proceeding.

Basis for Federal Jurisdiction

The plaintiffs invoked the jurisdiction of the District Court pursuant to the provisions of Title 28, United States Code, 1343 (3) and Title 42, United States Code, 1983. (Compl. Par. First, 1a)

Reasons for Granting the Writ

I.

The Decision Is of National Importance to the Future Administration of Public Schools in Cities With Large Negro Populations.

This is a public litigation affecting a community of over 75,000 people and touching a vital public interest. The NSP rule for pupil assignment adopted in 1949 is a non-discriminatory rule which prevails not only in the City of New Rochelle, but throughout the State of New York and in most cities throughout the north.[7] The expert testimony in the case (111a-112a), the decision of the State Commissioner of Education (App. C) and the statutes of New York (N.Y. Ed. Law §1801 (2)) all confirm that the method employed in large cities of assigning young children to elementary schools near their home is administratively and educationally sound.

Judge Moore in his dissent correctly put the issue when he said "The primary purpose of this action

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[7] The New York State School Boards Association representing 819 school boards throughout the State of New York filed an amicus brief below expressing its concern over the decision which if allowed to stand will require school administrators to make impossible determinations of the lawful racial mixture of pupils in the public schools. The Department of Justice has deemed this case of sufficient national importance to file an amicus brief in the Court of Appeals. The decisions of the District Court and the Circuit Court and the developments in the case attracted wide national attention, and were carried on the national wires of the Associated Press, United Press International, and published in the press from coast to coast. Leading newspapers commented on it editorially. The case was also reported nationally on radio and T.V.

was to declare the neighborhood school policy unconstitutional because it resulted in racial imbalances in a school located in a predominantly Negro residential area." (App. A p. 33). The decision he said "in its far-reaching implications, in my opinion, may seriously affect the school systems of this country". (App. A p. 9).

The scope and thrust of the constitutional claim is not directed against the City of New Rochelle alone. It is an assault upon an objective rule of school admission based on residence. New Rochelle has been selected as the testing ground. In their complaint plaintiffs allege "It has been well recognized that in many cities of New York State, and elsewhere, ghettos exist in which minority groups, usually minority racial groups, are crowded. As a result thereof, the public schools in such neighborhoods in such cities are segregated, reflecting the segregated pattern of the neighborhood." (Par. Fifth Compl. 2a).

The school condemned here is a bi-racial school. The decree denies the application of NSP to one district for no reason other than that it is heavily populated by Negroes. The complaint proceeds on the declared theory that in New Rochelle the imbalance is the result of residential patterns. The District Court in effect laid down a rule of conclusive presumption of unlawful intent where a school is "racially imbalanced". It also reached back 39 years and even relied upon pre-Civil War conditions (136a) to condemn an existing rule of law. If the doctrine of original sin is followed there is no end to how far back a court can go into the past to find unlawful intent and upset a valid contemporary regulation. Under

this decision no school board is immune from attack and the N.A.A.C.P. has so construed it.[8]

This poses a number of serious problems to school administrators in every large city in the country. Must they abandon NSP when Negro enrollment reaches an imbalance and establish a racial quota? What is the constitutional standard of racial mix which they must meet? How can they possibly stabilize a balance of racial attendance in the schools in the light of such uncontrollable factors as shifts in the population and the flow of children to non-public schools. The chance residential patterns in large urban communities also create religious and nationality imbalances in many school districts. Are these minorities also entitled to "equal treatment"?[9] These and a host of other administrative and educational problems too numerous to mention are the aftermath of this extraordinary decision.

It is of the utmost importance for this Court to clarify and settle the law for the guidance of school boards throughout the country. What practical basis for pupil assignments remains if a uniform and ob-

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[8] Since the decision herein, several suits have been instituted in the federal courts in the cities of Philadelphia (Pa.) Chicago (Ill.) and Newark (N.J.) attacking the NSP rule. Similar claims have been raised in San Francisco, California; Highland Park (suburb of Detroit), Michigan; Kansas City, Kansas; Stamford, Connecticut; and Englewood and Montclair, New Jersey. In each instance complainants have relied upon the decision of the District Court in this case.

[9] Following the decision of the District Court herein Petitioner was served with claims of parents in two other schools, one with a heavily imbalanced Italian enrollment and the other 90% Jewish. They demand the same treatment, to transfer to schools of their choice, as is accorded under the decree to residents of the Lincoln District.

jective rule based solely on residence is discarded? Judge Moore ended his opinion with the statement "Because of the importance of this case to the People of New Rochelle and their Board of Education, I would grant a stay of the decree for 30 days to give the defendants an opportunity for such further appellate review as may be available to them * * *." (App. A p. 35).

II.

The Decision Below Goes Far Beyond the Ruling in *Brown* v. *Board of Education*, 347 U.S. 483. It Conflicts With the Decisions of This Court in the Negro Jury Cases, With the Line of Cases Which Hold That Regulations of State Bodies Should Not Be Struck Down as Unconstitutional Unless They Are Clearly and Demonstrably Arbitrary, and With Decisions Dealing With Standing in Constitutional Cases.

A. The Decision Below Extends the Ruling in *Brown* v. *United States*, 347 U.S. 483 and Misinterprets Its Teaching.

Ever since the decision in *Brown* the word "segregation" has become the subject of colloquial abuse. As we read the case this Court struck down the "segregation complained of" (p. 495) which was "segregation of children in public schools solely on the basis of race" (p. 493). The decision rested upon the finding that Negroes "had been denied admission to schools attended by white children" (p. 488).

The record here presents a totally different picture. The purpose to discriminate which was not disputed in *Brown* is absent here. There is no such claim in the complaint, and discrimination may not be assumed

against a public body acting within the sphere of its lawful powers (*Ah Sin* v. *Witman*, 198 U.S. 500; *Snowden* v. *Hughes*, 321 U.S. 1, 8-9; *Brown* v. *Allen*, 344 U.S. 443); nor may it be spelled out by reference to conditions of thirty years ago having no relevancy to the contemporary scene.

Education in New Rochelle is offered on a nondiscriminatory basis, and Exhibit M proves it mathematically. (App. F) There are no separate schools for minorities, and no all Negro school. The racial distribution in all the schools is truly remarkable. The unusually fine integrated environment prevailing in all schools judged on a system-wide basis shows an acceptability of Negroes in the New Rochelle schools on a basis of complete equality and contains none of the discriminatory elements which this Court condemned in *Brown*. The holding below rests solely on the finding that in October, 1960 one school had a 94% Negro enrollment which the complaint does not claim was purposeful but attributes to the racial complexion of the neighborhood.

A reading of the opinions below indicates that both Courts construed the ruling in *Brown* as importing a new social and educational doctrine into the Fourteenth Amendment. Said the District Court—The presence of only 6% whites in the Lincoln School operates "* * * to deny to Negro children the opportunities for a full and meaningful educational experience guaranteed to them by the Fourteenth Amendment. Further, the fact that the Lincoln School contains approximately 6% whites, surely cannot divest Lincoln of its segregated character. In a community such as New Rochelle, the presence of

some 29 white children certainly does not afford the 454 Negro children in the school the educational and social contacts and interaction envisioned by *Brown*." (154a-155a) The majority of the Court of Appeals declared "So the present 94 per cent Negro enrollment at the Lincoln School goes beyond mere 'racial imbalance,' and approximates closely the harmful conditions condemned in the *Brown* case." (App. A p. 7) In his dissent, Judge Moore said that these rulings go "far beyond the bounds of *Brown*", and "If this is to be its [this Court's] construction of its *Brown* decision that Court should make it." (App. A p. 34)

B. The Decision Below Conflicts With the Rulings of This Court in The Negro Jury Cases.

In *Martin* v. *Texas*, 200 U.S. 316, and *Cassell* v. *Texas*, 339 U.S. 282, this Court held that the number (or lack) of Negroes on juries was in and of itself no proof of discrimination. The burden always rests upon the complainant asserting the constitutional claim to establish by clear and convincing proof that discrimination by public authorities was designed.

In the case at bar there is no finding and no proof as to the white and Negro population residing in the Lincoln District at the commencement of this suit. In the absence of facts and figures there can be no holding that the application in 1960 of the NSP rule to that district was discriminatory. (Cf. *Ah Sin* v. *Wittman*, 198 U.S. 500, 507-8). On the contrary the presumption of validity rule applicable to acts of State officials requires the federal courts to sustain such acts "if any state of facts [in this case the large number of white residents in the district] can be con-

ceived to sustain it". (*Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185).

C. The Decision Below Is in Conflict With the Established Doctrine That Federal Courts Will Not Condemn Acts of State Agencies Acting Within the Scope of Lawful Authority Unless So Arbitrary as Not to Be Justified on Any Reasonable State of Facts (*McGowan* v. *Maryland*, 365 U.S. 420).

This case does not present a justiciable question—but a problem of government—the solution of which lies more appropriately in the legislative and executive area. The judiciary is not competent to determine what is or is not a "meaningful educational experience". In the judgment of the Board of Education of the City of New Rochelle and the Commissioner of Education of the State of New York, the root of the evil is not racially imbalanced schools, but racially segregated neighborhoods. The educational authorities are not responsible for this latter situation, and they lack lawful power to change it.[10] They must build schools where children live, and in this respect the needs of Negro and white children are alike.

The problem is admittedly a difficult one. The establishment of school attendance districts by Petitioner must be judged in the context of the many years of study which it has given to this subject, the views expressed in the decision of the Commissioner

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[10] Lester Granger, a prominent Negro leader and former executive director of the National Urban League said recently "School boards in the North didn't create the Negro residential area • • • but if we spend most of our time battering school boards over the head, we overlook the real villains in the piece—Jim Crow-minded property owners and real estate brokers and developers." (The Reporter, Dec. 8, 1960 issue p. 30)

of Education, and the conflict among experts. It must also be read in the context of Petitioner's decision to strike at the same time at the housing pattern in New Rochelle by enlisting the aid of municipal authorities to rehabilitate the Lincoln area. (Ex. I). The new school proposed by Petitioner is an integral part of this program. At the initiative of Petitioner the City Council of New Rochelle has adopted a resolution approving an urban renewal plan for the area to improve housing conditions and attract white residents. (Ex. QQ). The District Court ruled that the construction of the new school will be violative of its decree and all steps in that direction have accordingly been halted. Unless reversed this most promising experiment undertaken by a community to solve a vital social problem will have been killed at birth.

D. The Decision Below Conflicts With the Principle That the Federal Courts Will Not Strike Down Action of State Officials Except at the Instance of a Person Actually Aggrieved.

The record shows that none of the plaintiffs attended the public schools of New Rochelle at the inception of this lawsuit (8a). They were not affected by the rule governing admission to the public schools and have no standing to attack it (*Hendrick* v. *Maryland*, 235 U.S. 610; *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288; *Tileston* v. *Ullman*, 318 U.S. 44; *Poe* v. *Ullman*, 367 U.S. 497). If this be deemed a class action then no child of elementary school age living in the present Lincoln District can complain of pre-1949 acts.

III.

The Decision Below Is in Conflict With the Decisions of the Courts of Appeal in the 4th and 5th Circuits.

It appears from the decision and opinions below that what has been decreed here is not "desegregation" but "integration". These are plainly different concepts. Since *Brown* the Courts in two other Circuits have held that this Court in *Brown* did not command integration (*School Board of Charlottesville, Va. v. Allan*, 240 F. 2d 59—4th Circuit; *Borders v. Rippy*, 247 F. 2d 268, 5th Circuit). In the latter case the Court said, p. 271:

> "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration, * * *"

In the case of *Boson v. Rippy*, 285 F. 2d 43—5th Circuit, the Court said: "Negro children have no constitutional right to the attendance of white children with them in the public schools." This statement is in direct contradiction with the view of the Court of Appeals in this case that the small number of whites in attendance in Lincoln School violates plaintiffs' constitutional rights.

In *Brown* itself a three judge court approved an NSP plan even though it resulted in an all Negro school (139 F. Supp. 468, 470). This plan is similar to the 1949 Resolution of Petitioner and its impact upon the Lincoln District results in a better racial ratio than in Buchanan District in Topeka. Although

the Topeka Board had admittedly been guilty in the past of deliberately creating a segregated school, that factor was not deemed to have any bearing on the proposed desegregation plan.

The rationale of the decision below cannot be reconciled with the rulings in the cases cited, and such conflict should be resolved by this Court.

IV.

The Decision Below Is in Conflict With Applicable State Law.

The decision of the District Court and the decision of the Commissioner of Education of the State of New York are in direct conflict on the same record. The opinion of the Commissioner sets forth the applicable law in New York with respect to this specific situation (App. C). It sustains NSP as a valid rule of educational administration in the State of New York and holds that it was properly applied to Lincoln District.[11] The high office of the Commissioner, the powers conferred upon him by the Legislature (Sec. 310 N.Y. Ed. Law), and his specialized knowledge of educational practices and conditions prevailing throughout the State clothe his decisions with a high degree of authority and respect. (The District Court ignored the Commissioner's decision and it is not mentioned in its Opinion)

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[11] Comparing the opinion of the Commissioner with those below it is plain that they differ on the law. The Commissioner held that the constitutional question had to be determined on the basis of the district boundary lines and the application of NSP regulation thereto in 1960. The District Court held the pre-1949 situation controlling.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

JULIUS WEISS
MURRAY C. FUERST
Counsel for Petitioners

Dated: New Rochelle, N. Y., October 2, 1961

Appendix A

Opinion, Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 427—October Term, 1960.

(Argued July 18, 1961 Decided August 2, 1961.)

Docket No. 27055

LESLIE TAYLOR and KEVIN TAYLOR, minors, by WILBERT TAYLOR and HALLIE TAYLOR, their parents and next friends, *et al.*,

Plaintiffs-Appellees,

—v.—

THE BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW ROCHELLE and HERBERT C. CLISH, as Superintendent of Schools of the City School District of the City of New Rochelle,

Defendants-Appellants.

Before:

CLARK, MOORE and SMITH,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Irving R. Kaufman, *Judge*.

Defendants, the Board of Education and the Superintendent of Schools of the New Rochelle City School District, appeal from the grant of equitable relief by way of injunction to the plaintiffs, eleven Negro children, suing by their parents for themselves and others similarly situated to enjoin the defendants from requiring plaintiffs to be registered in a racially segregated public elementary school and to require them to register plaintiffs in a public elementary school that is racially integrated. First opinion below reported in D. C. S. D. N. Y., 191 F. Supp. 181; other opinions not yet reported. Affirmed.

CONSTANCE BAKER MOTLEY, New York City (Thurgood Marshall and Paul Zuber, New York City, on the brief), *for plaintiffs-appellees.*

JULIUS WEISS, of Weiss & Bronston, New York City (Murray C. Fuerst, New Rochelle, N. Y., on the brief), *for defendants-appellants.*

JACK M. PERLMAN, New York City, for Seth M. Glickenhaus, Nolan M. Fallahay, and Marylyn W. Pierce, *applicants for intervention.*

BURKE MARSHALL, Asst. Atty. Gen., Harold H. Greene and Isabel L. Blair, Attys., Dept. of Justice, Washington, D. C., and Robert M. Morgenthau, U. S. Atty., S. D. N. Y., New York City, for United States as *amicus curiae,* for affirmance.

EDWIN J. LUKAS, LEO PFEFFER, ARNOLD FORSTER, SIMON ROSENZWEIG, and ARTHUR PULLEY,

New York City (Theodore Leskes, Sol Rabkin, and Joseph B. Robison, New York City, of counsel), for American Jewish Committee, American Jewish Congress, Anti-Defamation League of B'nai B'rith, Catholic Interracial Council of New Rochelle, and Urban League of Westchester County, *amici curiae*, for affirmance.

BERNARD T. MCGIVERN, Albany, N. Y., for New York State School Boards Association as *amicus curiae*, for reversal.

CLARK, *Circuit Judge*:

This is a class action brought by eleven Negro children through their parents, on behalf of all Negro children situated in the Lincoln Elementary School District in New Rochelle, New York. Plaintiffs seek principally a permanent injunction enjoining the defendants, the Board of Education and the Superintendent of Schools of the New Rochelle City School District, from requiring them to be registered in a racially segregated public elementary school and requiring the defendants to register them in a public elementary school that is racially integrated. After an extensive trial the District Court, per Kaufman, *J.*, on January 24, 1961, wrote a detailed opinion, reported in D. C. S. D. N. Y., 191 F. Supp. 181, making findings of fact and conclusions of law supporting the plaintiffs' case and directing the defendant Board to present to the court on or before April 14, 1961, a plan for desegregation to begin no later than the start of the 1961-62 school year. Reference is made to this opinion for a detailed statement of the facts here relevant.

The defendants took an appeal, which this court, by divided vote, dismissed as premature. *Taylor* v. *Board of Education, etc.*, 2 Cir., 288 F. 2d 600. Thereafter proceedings were had below resulting in an opinion (not yet reported) and decree of May 31, 1961, which directed the defendants to allow students in the Lincoln Elementary School (the school here in issue) to transfer to other elementary schools within New Rochelle. To comply with the court's directive the defendants had submitted with reluctance a plan for such transfers under conditions which the court found unduly burdensome. So the court in accepting the plan rejected all conditions—other than those of detail as to the time and manner of application—except two, viz., that parents must provide any necessary transportation at their own expense and that there must be available school space for the transferees. It is from this decree—further details of which are noted hereinafter—that the present appeal is taken.

A major finding of the court below was that the defendant School Board had deliberately created and maintained Lincoln School as a racially segregated school. This crucial finding is, we conclude, supported by the record. Thus, around 1930, an area of several blocks, occupied by whites, was carved out of the Lincoln District and added to the Daniel Webster District, even though this area was adjacent to the Lincoln School and was a relatively long distance from the Webster School. When Negroes later moved into this area it was restored to the Lincoln District. In addition, children from the predominantly white Rochelle Park within the Lincoln District were removed from that district and assigned to the Mayflower School. It also appears that until 1949 the

Board allowed white children within the Lincoln District to transfer to other schools, with the result that Lincoln School in 1949 was 100 per cent Negro. The defendants sharply attack the testimonial evidence received on this issue; but the basic facts just recited, which appear incontrovertible, support the finding and leave as the vital problem the later conduct of the Board and its present responsibility for the conditions stimulated prior to 1949.

On January 11, 1949, the Board adopted a policy of refusing further transfers and of admitting new students only to the school of the district in which they reside. This policy of attendance at the school of the district of residence, the "neighborhood school policy" or NSP, had been in existence for some time, but with the amelioration provided by the system of permissive transfers; henceforth it was to be applied with complete rigor. While it did mean that a small number of white children were retained in the district, yet it served to fix the Lincoln School as a segregated one, so that it is now 94 per cent Negro. At the same time that the Board settled its policy in 1949, it promised a study of district lines with a view to setting up school districts in terms of the best interests of all the children and of the most complete utilization of the present physical plant; and thereafter it caused several surveys to be made by its own school personnel or others. One of the most complete was that made by a professorial team from Teachers College, Columbia, and the School of Education of New York University, resulting in December 1957 in the Dodson Report, so called from its Director, Professor Dan W. Dodson, a specialist in the field who testified for the plaintiffs below. This report, whose official title was "Racial Imbalance in Public Education in

New Rochelle, New York," was a most comprehensive statement of the problem and an admonition to the Board to make a broadly based attack upon the evil of segregation, with specific recommendations more extensive and drastic than those in the decree under appeal. See D. C. S. D. N. Y., 191 F. Supp. 181, 188-190.

Major recommendations of the Dodson Report included proposals for the rebuilding of a larger Lincoln School on the same site, with the discontinuance of nearby Washington School, together with extensive redistricting and a more flexible use of NSP in the future. But the Board took no action other than to propose rebuilding the Lincoln School on its present site, which in the light of the Board's policy of refusal to allow childen to transfer to schools in other districts would mean a freezing in of segregation at Lincoln. The proposal, once defeated, was, however, eventually carried by referendum vote of the New Rochelle voters in May 1960; and the imminence of plans for the rebuilding of Lincoln precipitated this class action instituted in October and brought to trial in November 1960.

It must be acknowledged that the problems facing the Board, while not peculiar to this community, are serious and difficult. They arise when people of a single racial group tend to settle in a particular neighborhood such as the Lincoln District here, and the trend is accelerated by housing developments and real estate transactions increasing the group numbers. Even so, the action of public bodies, of which school boards are most potent because of the importance of public education in American life, must be in accordance with the constitutional standards as expounded

by the Supreme Court.[1] The facts recited above showing the Board's acceleration of segregation at Lincoln up to 1949 and its actions since then amounting only to a perpetuation and a freezing in of this condition negate the argument that the present situation in Lincoln School is only the "chance" or "inevitable" result of applying a neighborhood school policy to a community where residential patterns show a racial imbalance. Rather they make it appear that the Board considered Lincoln as the "Negro" school and that district lines were drawn and retained so as to perpetuate this condition. In short, race was made the basis for school districting, with the purpose and effect of producing a substantially segregated school. This conduct clearly violates the Fourteenth Amendment and the Supreme Court decision in *Brown* v. *Board of Education of Topeka*, 347 U. S. 483, 38 A. L. R. 2d 1180. See *Clemons* v. *Board of Education of Hillsboro, Ohio*, 6 Cir., 228 F. 2d 853, certiorari denied *Board of Education of Hillsboro, Ohio* v. *Clemons*, 350 U. S. 1006; *Holland* v. *Board of Public Instruction of Palm Beach County, Fla.*, 5 Cir., 258 F. 2d 730.

So the present 94 per cent Negro enrollment at the Lincoln School goes beyond mere "racial imbalance," and approximates closely the harmful conditions condemned in the *Brown* case. Since these conditions were the result of the deliberate conduct of the Board,

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[1] The Board makes much of a decision in its favor in an adversary proceeding brought by these plaintiffs before the State Commissioner of Education. But from the terms of the decision we are forced to conclude that the official did not feel himself subject to the constitutional constraint to the same extent as we do.

the plaintiffs and those similarly situated are entitled to some form of relief.[2]

The plan which the court eventually adopted is one noteworthy for its moderation. It is not one supported by the Dodson Report, but it appears to have been followed with at least fair success in other cities such as Baltimore. It can be put into operation with little administrative difficulty or public expense, as the Board showed in the submission of its own plan, which is the actual basis of the decree finally entered. Under this decree, students who would normally enroll at Lincoln School may apply for transfer to other elementary schools in New Rochelle. They may list at least four choices in order of preference, and are entitled to transfer to the same grade as they would attend at Lincoln, without any necessity of emotional or academic testing or approval. The parents of the students who elect to transfer are obligated to furnish transportion at their own expense; and the right to transfer is subject to the existence of room in the other schools, within the limits of the Board's present policy of maximum class size. We think this plan an eminently fair means of grappling with the situation, in accord with the principles stated in the *Brown* case. Doubtless it will not solve all problems, but it does call for a sincere attempt at recognition of the principle of desegregation in this community. The court's retention of jurisdiction to assure full compliance with the decree gives it also power to make or consider modifications as the need therefor may appear.

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[2] Under the circumstances we need not examine the interesting issue how far a public body may save itself from constitutional constraint by mere inaction.

The decree must therefore be affirmed. On remand the district court, in view of the delay, will undoubtedly wish to set a later date for applications for transfer for the current school year. We see no occasion to grant a stay of the decree; the Board is called upon for no new public expenditures and will suffer no loss, while the school children will be prejudiced by what will soon be necessarily a year's delay at this crucial period in their education.[3]

Decree affirmed.

MOORE, *Circuit Judge* (dissenting):

I cannot agree with the opinion of the trial court or that of my colleagues. The defendants have lost and, absent some further review, they and the school children of New Rochelle must conform to the views of a Federal court. However, beneath a banner emblazoned with the words "constitutional rights" and "segregation," is a decision which in its far-reaching implications, in my opinion, may seriously affect the school systems of this country. Our future is closely linked to our educational program. But more closely connected with our heritage are such concepts as individual freedom, democratic elective processes, States' rights and equal protection of our laws for all. Too easy is it to march behind a banner bearing such slogans. History records that the populace, sing-

[3] The petition to intervene presented by Seth M. Glickenberg *et al.*, the three minority and dissenting members of the nine-member Board, is denied, since the point they wish to make, that the appeal here was not authorized by official Board action, appears not to be well taken. Of course their general stand in favor of more affirmative action against school segregation accords with the decision here and in the court below.

ing and cheering, once marched behind a certain gigantic horse of wood. It seemed harmless enough at the time. History has a way of repeating itself. Would that my Cassandra-like pessimism may prove to be ill-founded. It is doubtful in any event that her warnings ever saved anyone or any nation. I do not claim to have the answer to the problem of racial imbalance throughout the world or even the school problem in New Rochelle. I merely would venture the thought that there may be many different answers and solutions, possibly many unsolvable cases and that these problems should be left to the judgment and discretion of the communities involved, provided, of course, that such judgment be exercised without discrimination in civil rights because of race, color, creed or religion.

Eleven Negro children by their parents in late 1960 filed their complaint (on their own behalf and on behalf of all other Negro children similarly situated) against The Board of Education of The City School District of the City of New Rochelle (the Board) and Herbert C. Clish, as Superintendent of Schools of The City School District of the City of New Rochelle (the Superintendent), as defendants. They allege that the proceeding is "for a permanent injunction enjoining the Defendants from requiring the Plaintiffs to be registered in a racially segregated public elementary school" and affirmatively "requiring them to register the said Plaintiffs in a public elementary school that is racially integrated." The relief sought is that the Court enter a decree:

A. Declaring the application and continuation of the "neighborhood school" policy in New Rochelle to be illegal and unconstitutional and a violation of

the due process and equal protection clauses of the Fourteenth Amendment;[1]

B. Enjoining defendants from requiring plaintiffs and others of their class to attend a racially segregated public elementary school;

C. Requiring defendants to register plaintiffs and others in a racially integrated school; and

D. Enjoining defendants from constructing a school in a location that will render it racially segregated "if the Defendants continue to operate the public schools in the City of New Rochelle on a 'neighborhood school' policy."

Despite a modern tendency to regard pleadings as old-fashioned—and hence of little value—only by such allegations can the issues be ascertained and defendants advised of the charges against them (parenthetically, also a constitutional right). The complaint is broad in its sociological concepts. It recognizes that "in many cities of New York State, and elsewhere, ghettos exist." Into these ghettos minority racial groups are crowded. "As a result thereof, the public schools in such neighborhoods in such cities are segregated, reflecting the segregated pattern of the neighborhood." The conclusion is reached that "so long as the Defendants adhere to this 'neighborhood school' policy in the City of New Rochelle, segregated schools will exist there."

Reading some of the more specific charges, the complaint alleges that:

1. there are public elementary schools in New Rochelle "attended only by white children";

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[1] United States Constitution, Fourteenth Amendment, Section 1.

2. there is a school "attended only by Negro children";

3. the educational background of the teachers in the allegedly segregated school is inferior;

4. the curriculum in the allegedly segregated school is inferior to the allegedly all-white school;

5. the operation of a "neighborhood school" policy and defendants' refusal to cease such operation violates the rights of plaintiffs and others under the Fourteenth Amendment.

A trial ensued. Over 2,000 pages of testimony were taken, scores of exhibits were introduced. The history of the school problems before the Boards of Education, the city fathers and the people of New Rochelle from 1930 on was put upon the record after a fashion by school board members, past and present, school principals, P.T.A. members, "experts" in the field of education, by reports from the experts which usually, as might be expected, differed radically each from the other, protagonists for one side or the other and the customary amount of hearsay, opinion and speculation always attendant to the task of solving the unsolvable. Conclusions, the "hall mark" of experts' opinions, ranged from "In large measure the problem is not one of race relation, but of differences in socio-economic status of one segment of the community as compared with the other" to "No presently known techniques can now create complete integration of the Lincoln School district, one of these three, and still retain educational values." Various witnesses gave their views as to what constituted segregated schools in their own minds. The percent-

ages sufficient to so characterize a school varied from 50% to 80%.

The best account of the problems presented to the Board during the last ten years (1950-1960) is found in the testimony of Kenneth B. Low who from 1950 to 1960 served on the Board and was its President from 1958 to 1960. He had had a distinguished career in the field of interracial relations and for seven years had served as Chairman of the Westchester County Council appointed by the State Commission Against Discrimination. In answer to the trial court's suggestion that there might be "some solution by changing the district line," namely, by cutting "into Mayflower and Webster and Washington," he points out that the "Dodson" recommendation would result in a 71% Negro student population. This the court thought would be "a step in the right direction"; Mr. Low was of the belief that it would be "a start in the wrong direction." "Solutions," he said, which sent "youngsters out of the district because of their race," as discussed before the Board, brought about "discrimination in reverse because you are creating special conditions for people on account of their race and that it could and perhaps should apply equally to other schools which had either a racial imbalance or a religious imbalance or an imbalance of national backgrounds, and the result is that it would establish a precedent for sending children, because of any of these factors, to schools, which was believed to be a violation of basic principle." (One school was over 90% Jewish and one over 90% Italian.) "But [said Mr. Low] I am not going to violate what I consider to be basic constitutional principles, and the mere fact that this [Lincoln] happens to be a badly imbalanced racial school is not due to any act of the Board of Education. It is a residential condition."

The Issues

The relief sought was a permanent injunction. Of necessity an injunction must operate presently and prospectively. It should be granted or denied in the light of existing conditions and not upon practices or regulations no longer in effect.[2] Yet vast amounts of testimony were taken concerning the situation from 1930 to 1949 and from 1949 to 1960.

Quite apart from the conflict in the opinions of various witnesses, certain salient facts are undisputed.

1. The Board is authorized by Article 51 of the New York Education Law to administer the School District and constitutes an incorporated municipality (N. Y. Ed. Law, Sec. 2502(1)). The Board "shall have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication * * * " (Sec. 2503).

2. Amongst other powers, the Board is authorized to "determine the school where each pupil shall attend," select sites for school buildings and to exercise its judgment as to the need of any district for a new building (Secs. 2503(4)(d), 2512(2)(4)).

3. New Rochelle now has twelve school districts, and long prior to 1930 has had school districts, in each of which is located a public elementary school. As of October, 1960, 6,732 children attended these schools.

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[2] See e.g. *United States* v. *Prince Ltd.*, 242 U. S. 537 (1917); *Lewis Publishing Co.* v. *Wyman*, 228 U. S. 610 (1913); *Dinsmore* v. *Southern Express Co.*, 183 U. S. 115 (1901).

4. For many years the Board has followed a neighborhood school policy. The factors which enter into the decision to maintain schools in various residential areas of the city include accessibility to the home (walking distance being important where young children 5 to 11 years of age are involved), traffic and safety problems, and recreational and community facilities afforded to neighborhoods by the school buildings.

5. In drawing any district lines, there must be some contiguity between districts.

6. The present Lincoln School building built in 1898 is antiquated.

7. The decision of the Board to replace it was made after a consideration of the many problems presented, including financial and tax problems after an exercise of judgment and after a referendum to the people on the question.

8. New Rochelle does not now have and never has had a school from which Negro children were excluded. Segregation, as the term is popularly used in the various decisions on the subject, has never existed in the school system of the city.

9. During the last 30 years a large number of Negro families have moved into the area in which the Lincoln School is located.

10. In 1949 the Board cancelled a permissive transfer plan because it had a tendency to promote racial imbalance. Since that date all children have had to attend the school within the district of their residence.

The Opinion of January 24, 1961

In its opinion (191 F. Supp. 181) the trial court, in effect, turned the case from a segregated school case into an integration case. This turn was required because there was no proof whatsoever of segregation; there was proof of racial imbalance in various sections of the city. *Brown* v. *Board of Education*, 347 U. S. 483 (1954); 349 U. S. 294 (1955), a true segregation case, was used as the principal reason for ordering the Board to present "a plan for desegregation." Since there was no segregation, obviously there could be no desegregation.

The Board appealed. This court held the appeal to be premature and dismissed it, saying, however, that "this dismissal involves no intimation on our part with respect to the propriety or impropriety of the determination of the District Court," but that "the balance of advantage lies in withholding such review until the proceedings in the District Court are completed." This court made it perfectly clear that all rights were protected "if the finding of liability were ultimately to be annulled." (288 F. 2d 600.) And so the proceeding continued.

Protesting that "since the school system of New Rochelle is not operated on a 'segregated' basis it is impossible to submit a plan which will put an end to segregation" and that the "command to alter the 'racial imbalance' is too vague a standard," the "Board perplexed as to what racial mix meets the requirement of the Fourteenth Amendment" under protest and "in response to the Court's order" submitted a plan which is "neither the choice of the Board nor is its adoption recommended." A minority plan was also filed by three members of the Board. Objections

were filed by plaintiffs and the trial court thereafter entered its decree of May 31, 1961.

Upon this appeal this court is charged with the duty of reviewing (1) the trial court's decision of January 24, 1961, and (2) its decree of May 31, 1961.

The Decision of January 24, 1961

First must be considered whether plaintiffs have established a case that the schools of New Rochelle are being operated on such a segregated basis in the year 1961 that desegregation is called for under the doctrine of *Brown* v. *Board of Education*.

Upon the trial plaintiffs failed to establish every factual element necessary to sustain a charge of segregation. There were no "all white" schools. There were no "all Negro" schools. There were no statutes, rules, regulations or policies denying admission of Negro children to schools attended by whites. The trial court focused its attention primarily on certain events from 1930 to 1949 and from 1949 to 1960 as proof of a purposeful scheme on the part of the Board to turn Lincoln into a segregated school.

The trial court's decision that the Board violated the Fourteenth Amendment is based on two conclusions both of which individually or together were considered sufficient to make out unconstitutional discrimination. The first (I) is "that the Board * * *, prior to 1949 intentionally created Lincoln School as a racially segregated school, and has not, since then, acted in good faith to implement desegregation as required by the Fourteenth Amendment." The second (II) is "that conduct of the Board of Education ever since 1949 has been motivated by the purposeful desire of maintaining the Lincoln School as a racially segregated school."

I

Before turning to the factual basis for the first conclusion, a few general propositions which limit the inquiry to be made when action by a State is challenged as denying equal protection of the laws should be stated. As the Supreme Court held in *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911):

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

Accord, e.g., *McGowan* v. *Maryland*, 6 L. Ed. 2d 393, 29 Law Week 4488 (U. S. Sup. Ct., May 29, 1961). And it is generally the rule that the courts "cannot undertake a search for motive in testing constitutionality." *Daniel* v. *Family Security Life Ins. Co.*, 336 U. S. 220, 224 (1949). It is true that motive is not

entirely irrelevant in determining whether action by State administrative officials constitutes unconstitutional discrimination. The discrimination, however, must be intentional or purposeful. A "discriminatory purpose is not presumed * * *; there must be a showing of clear and intentional discrimination." *Snowden v. Hughes*, 321 U. S. 1 (1944).

Judged by these standards, can it be said that the present racial imbalance existing in the Lincoln School was clearly created by purposeful and intentional discrimination by the Board? It is an undisputed fact the Lincoln School was built in 1898—long before any of the alleged discrimination is claimed to have occurred, and before there was a substantial Negro population living in the Lincoln neighborhood. Thus, the original selection of the site for Lincoln was not, and could not have been, motivated by a desire to create a segregated school. Next, the record discloses that the Board chose to operate, and has for decades operated, the elementary school system pursuant to a neighborhood school policy under which the city is divided into districts determined by considerations of proximity to the school, safety and school size. And there is no dispute that a plan which classifies students solely on the basis of where they live is, on its face, eminently reasonable and constitutional. Thus, there being nothing illegal in the location of the Lincoln School or in the choice of plans used to allocate students among the various schools, the illegality found by the trial court must of necessity have resulted from the application and administration of this concededly valid plan. Looking at the boundary lines of the Lincoln School district, there cannot be found "an uncouth twenty-eight-sided figure" (see *Gomillion v. Lightfoot*, 364 U. S. 339 (1960)), nor two separate zones located in opposite ends

of the city (see *Clemons* v. *Board of Education of Hillsboro*, 6th Cir., 1956, 228 F. 2d 853) nor even any thing suggesting abnormal or irregular zoning. On the contrary, the Lincoln School lies in the center of a compact district, which, with the exception of a few slight contours, is basically a nonelongated rectangle. Each of the 12 elementary school districts is served by a centrally located school, and in none of the schools is there an all-white or all-Negro enrollment.[3] Moreover, it is also undisputed that the neighborhood school policy is presently strictly adhered to so that white students living in the Lincoln district are not allowed to attend other public elementary schools and Negro students living outside of this district are not permitted or required to attend Lincoln.

The classification used by the Board being reasonable and being administered reasonably and uniformly, further inquiry might well stop at this point because motives of the Board or past boards are irrelevent. Nevertheless, further pursuit reveals nothing in the record supporting the conclusion that the present situation at the Lincoln School is the result of purposeful discrimination by the Board. In so concluding, the trial court relied heavily on its finding that the Lincoln School district was "gerrymandered" in 1930, and that thereafter the lines were changed so as to contain the Negroes as the population expanded. Specifically, it was found that "the boundry lines between Webster and Lincoln were so drawn that, in one section, they were extended to a point directly across the street from

[3] For example, Trinity and Jefferson Schools—located in predominantly white neighborhoods—have 5 per cent and 7 per cent Negro enrollments, respectively; Washington, Mayflower and Webster—all contiguous to the Lincoln district—have over 50 per cent, and approximately 30 and 30 per cent, respectively, Negro enrollment.

Lincoln School"; that this line was moved westward to contain the population expansion of Negroes in the district, and that during the same period, alterations were being made between the Lincoln district and the Maytlower district.

Accepting the fact that the district lines were so moved in this period, this alone does not amount to gerrymandering, unless it be shown that the redistricting was done for the purpose of, and resulted in, the exclusion of white children and the inclusion of Negro children. The proof as to both purpose and effect is fatally defective. No facts were produced to show the racial composition of Lincoln district either before or after the supposed "gerrymandering." In fact, the only testimony relevant to the issue of "gerrymandering" was that of a Mrs. Bertha White, who stated that the redistricting corresponded to Negro population changes. Mrs. White had no first hand knowledge of the situation in 1930; nor did she supply facts and figures as to the racial balance existing at the periods when the lines were changed. Her conclusions were based exclusively on conversations "with children who went to school in 1929 and 1930, who had younger brothers and sisters who went to the school." It is claimed that this hearsay, or perhaps more accurately, double or even triple hearsay, is corroborated by a letter written in 1949 by Kenneth B. Low, former member of the Board. This letter states that "in 1930 the board participated in creating an overbalance of negro pupils in Lincoln School which steadily increased with the development of the neighborhood * * * " This statement cannot possibly corroborate Mrs. White's testimony or be relevant to purposeful discrimination in 1930. No one disputes the fact that as an incident of the neighborhood school

policy a racially overbalanced school has resulted but to show an unconstitutional discrimination, it must at least be proven that this overbalance was created intentionally and purposefully, and as to the existence or nonexistence of this fact, Mr. Low's letter adds nothing.

This point, however, need not be belabored since the evidence demonstrates to an almost mathematical certainty that the present "racial imbalance" in the Lincoln School could not have resulted from this alleged "gerrymandering." Had the boundary lines between Lincoln and Webster not been so drawn in 1930 "that, in one section, they were extended to a point directly across the street from the Lincoln School," but instead had been drawn so that the Lincoln School was in the center of its district, the racial balance would have been no different today because the present district lines are now drawn as plaintiffs presumably claim they should have been drawn in 1930. Or had the Board not moved the district lines westward as the Negro population expanded in that direction, again it is clear that the Lincoln School today would still be predominantly Negro—in fact, the school being situated as it is in the center of the Negro area of the city, it is highly probable that the racial balance would be even more one-sided than it presently is.

What then caused the present "imbalance" in the Lincoln School? The undisputed facts reveal that since 1930 the Negro population in New Rochelle has increased by more than 50 per cent and that the Lincoln School lies in the center of the predominantly Negro area. Because of this heavy concentration and in view of the limited capacity of the Lincoln School, there is virtually no dispute that it would be impos-

sible to draw district lines which would materially alter the present racial imbalance. The conclusion is thus inescapable that the population movement over the years has completely vitiated the effects of any supposed "gerrymandering" in the 1930's.

Similarly, the Board's pre-1949 transfer policy is completely irrelevant in respect to the situation as it exists in 1961. The discriminatory application of this policy may have resulted in the denial of equal protection of the law to Negro children attending Lincoln prior to 1949 and have contributed to the imbalance as it existed in 1949. However, with the passage of twelve years, this court can take judicial notice that the students affected by this policy have progressed beyond the elementary school level. Thus, with the elimination of the permissive transfer policy in 1949, its effects now have entirely disappeared.

The concept of causation pervaded the law long before the adoption of the Fourteenth Amendment or even the United States Constitution. In order to obtain relief from an injury which allegedly results from unconstitutional State action, it is necessary to show both that the State has acted unconstitutionally and that this action caused the injury of which the plaintiff complains. The plaintiffs' case here is defective on both these requirements.

II

The first basis for the decision below being erroneous, the decision must stand or fall on the trial court's conclusion "that the Board of Education even since 1949 has been motivated by the purposeful desire of maintining the Lincoln School as a racially

segregated school," and that this behavior violated the Fourteenth Amendment.

As the trial court properly noted, "Constitutional rights are determined by realities, not by labels or semantics." Thus, in order to appreciate fully the significance of the decision and to determine exactly what is meant by "purposeful desire of maintaining * * * a segregated school," a close analysis of the opinion is necessary. The opinion states that if the illegal motive is present, "it makes no meaningful difference whether the segregation involved is maintained directly through formal separation, or indirectly, through over-rigid adherence to artificially created boundary lines, as in the present case * * * [and] [s]imilarly, it is of no moment whether the segregation is labelled by the defendant, as 'de jure' or 'de facto,' as long as the Board, by its conduct, is responsible for its maintenance" (191 F. Supp. 181, 194). In a footnote, "de jure" is defined as "segregation created or maintained by official act, regardless of its form," and "de facto" is defined as segregation resulting from fortuitous residential patterns. (*Id.* footnote 12.) The minor premise is then supplied by the finding that "the inference is inescapable that the Board's deliberate intransigence and inflexibility for the last eleven years in the face of public pressures and expert advice were motivated by a desire to continue Lincoln School as a racially segregated school, and thus not to alter the racial balance in the city's other elementary schools" (*Id.* at 195), and that the Board by its "arbitrary rejection of all proposals for change has purposefully maintained Lincoln as a segregated school." (*Id.* at 197.)

As previously mentioned, the present racial imbalance at Lincoln did not result and could not possibly

have resulted from purposeful conduct (of which there was no convincing proof) by the Board. Moreover, in determining the legal import of the opinion, there must be excluded the finding that the boundary lines of the Lincoln district are artificial because a mere glance at the school district map of New Rochelle refutes this view, as does the undisputed expert testimony that, given the size and location of Lincoln, the lines could not be redrawn so as to materially change the present racial imbalance. Finally, the opinion must be viewed in the light of the entrenched rule of law that only "State action of a particular character is * * * prohibited by the Fourteenth Amendent" (e.g., *Civil Rights Cases*, 109 U. S. 3, 11 (1883), that the "Amendment erects no shield against merely private conduct, however discriminatory or wrongful" (*Shelley* v. *Kraemer*, 334 U. S. 1, 13 (1948)), and that thus if *State action* did not purposefully create the present racial imbalance at Lincoln, the Constitution would not place an affirmative duty on the Board to desegregate. "The equal protection and due process clauses of the fourteenth amendment do not affirmatively command integration * * * " (*Borders* v. *Rippy*, 5 Cir., 1957, 247 F. 2d 268, 271); "The Constitution in other words does not require integration. It merely forbids discrimination * * * " (*Briggs* v. *Elliott*, E. D. S. C., 1955, 132 F. Supp. 776, 777).[4]

[4] See also *Bowen* v. *Gadsell*, E. D. Mich. 1958, 165 F. Supp. 87: "The fact that in a given area a school is populated almost exclusively by the children of a given race is not of itself evidence of discrimination." Accord, *Scaly* v. *Dept. of Public Instruction of Penn.*, 3 Cir., 1958, 252 F. 2d 898, cert. den. 356 U. S. 972. The plan that was finally approved in the historic *Brown* case provides for an all Negro school in an all Negro neighborhood. The three judge District Court there stated: "If it is a fact, as we understand it is, with respect to Buchanan School that the

Viewed in this factual and legal context, what then is the rule of law laid down by the court below? The trial court has held in effect that when racial imbalance not attributable to unconstitutional State action is present in a public school, the State or its agencies, although not being required to change the situation, cannot refuse to act if the refusal is motivated by purposeful desire to maintain the condition. In short, the court has extended the Constitution to the point where motives for State non-action are now relevant. But does not the mere statement of this rule, stripped of its semantic gloss, carry its own refutation? If an existing law or its administration does not violate the Constitution, and if the State is not denying equal protection of the laws by not changing this law, by what alchemy does a refusal to change on the ground of an "illegal motive" turn this non-action into unequal protection of the law? Law is not a state of mind; it is an objective, though perhaps elusive and everchanging, phenomenon.

Rarely are motives for official action subject to inquiry (e.g., *Daniel* v. *Family Security Life Ins. Co., supra; Wilkinson* v. *United States*, 365 U. S. 399, 412 (1961)). At least when a State acts affirmatively, a change in the *status quo* results, and from this change the courts can glean insights into the underlying purpose of the official action. But by what criteria can

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district is inhabited entirely by colored students, no violation of any constitutional right results because they are compelled to attend the school in the district in which they live." *Brown* v. *Board of Education of Topeka*, D. C. Kan. 1955, 139 F. Supp. 468, 470. Both the judge below and plaintiffs' trial counsel praised the City of Washington, D. C., as a model of integration. The Superintendent of Schools of that city reports that in 1960, after five years of desegregation, 11 out of 60 schools in the system were all Negro; and in 13 schools the white enrollment is less than 10 per cent.

we judge why men refuse to act when they have no duty to act? Take, for example, the trial court's finding as to the Board's motive for its "intransigence and inflexibility for the last eleven years." This conclusion is supposedly supported by the Board's refusal to adopt a number of plans for changing the Lincoln situation submitted by various experts in school planning.[5] The Dodson Report, for instance, called for:

> "1) The rebuilding of a larger Lincoln School on the same site;
>
> 2) The discontinuance of Washington School;[6]
>
> 3) Extensive redistricting; and
>
> 4) The more flexible use of the neighborhood school policy in the future."

A decision to discontinue Washington School and to rebuild Lincoln School or to make any other decision

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[5] The Board had reports from Dodson, Englehardt, Johnson and the decision of the Commissioner of Education of the State of New York after a plenary hearing in a proceeding brought by three of the plaintiffs herein on their own behalf and all others similarly situated attacking the school zones and the decision to build a new Lincoln School on the site of the present school. The Commissioner in part held:

> "The issue here before me is not whether some other arrangements may constitute a better solution. The issue, as pointed out heretofore, is whether the Board, after all its investigations and surveys, has been arbitrary in coming to the conclusion it did. Upon the record before me, I cannot find the action of the respondent Board, in determining to replace the Lincoln School with a modern structure and up-to-date facilities, constituted a reversible abuse of discretion" (Ex. K, p. 6).

[6] Were Lincoln and Washington combined (assuming such a plan to be geographically feasible—an assumption of doubtful validity), such a district would still have approximately 80% Negro enrollment.

which would affect the school system of the entire city called for the exercise of judgment in the light of existing conditions. It is doubtful that there is "a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion." *Beauharnais* v. *Illinois*, 343 U. S. 250, 262 (1952). Which of the many divergent suggestions of the many experts was the best in the light of other factors which had to be considered? One member of the Board might have been influenced by the costs involved; another by the waste in tearing down an existing school; another might have acted out of sheer inertia; and another might have acted honestly and in the exercise of sound judgment. This latter situation is the only conclusion supported by the facts in the record. Even viewed in a looking glass, any presumption of guilt unless innocence is clearly established has been rebutted. When a decision is intimately connected with local policy and involves matters in which judges have no "expertise" but only "opinions" how can they decide (1) whether a plan should have been adopted and (2) whether its rejection was based on "illegal motives"?

The only affirmative action by the Board was the decision to build a new Lincoln School on the site of old Lincoln. This decision might have been unconstitutional only if it were made for the purpose of creating a segregated school. In view of the Board's rejection of other plans for the specific reason that they would tend to worsen the racial imbalance in New Rochelle, a finding of illegal motive could not be supported, even were it material. Their judgment supported by a city referendum is that the Lincoln district needs a new school; that a new building may well improve the character of the neighborhood; and that mergers of

certain districts are not advisable. Why should the Federal courts believe that their crystal ball is of better quality than that of the Board? Moreover, what is the relevance of a new Lincoln to old Lincoln? The decision below is predicated upon the theory that the Board unconstitutionally created and maintained old Lincoln; this theory has no basis in fact. Even assuming, therefore, that the decision to build a new Lincoln might have been unconstitutional (which in my opinion it was not), this would not change the fact that as to old Lincoln the Board has not acted unconstitutionally.

Although it should not be necessary, it is worthy of note that the Constitution does not declare what is desirable or undesirable (see, *e.g.*, *Daniel* v. *Family Security Life Ins. Co.*, *supra*); nor should judges confound "private notions with constitutional requirements." (*American Fed. of Labor* v. *American Sash & Door Co.*, 335 U. S. 538, 556 (1949) (concurring opinion, Frankfurter, *J.*).) Racial imbalance, as it exists in many of our cities and suburbs, presents a serious problem. And yet, I find nothing in the record which makes a racial imbalance a violation of our Constitution.

The Decree of May 31, 1961

Concerned that the majority of the Board should manifest a "continuation of their attitude of arrogance" by their assertion of their constitutional right to claim that "no constitutional rights have been violated" and their adherence to their opinions as to the law instead of recognizing it to be as the trial court declared it, the court, although conceding that it could not "divine every possible eventuality which may arise in the future," decided that "the device of

permissive transfers will afford the Negro children in the Lincoln district their constitutional rights." This is the same "device" which until abandoned by the Board in 1949 plaintiffs claim created Lincoln as an all Negro school. Furthermore, if this device does not "assure complete relief" to the court's satisfaction, it announces its availability "to consider other methods" —an assurance of continued court operated schools for the future.

But what will be the effect of this device? The court's decree provides that "*any* child of elementary school age residing in the Lincoln Elementary School District shall be permitted to register and enroll in any other public elementary school in the New Rochelle Public School System, in accordance with the provisions of this decree." (Emphasis supplied.) The Board is required to distribute to the parents "of all children," expected to be enrolled in Lincoln, transfer application forms. Applicants are to list four schools in preferential order to which transfer is desired. The Board is shorn of any discretion "to impose any standard of academic achievement or emotional adjustment as a requirement for transfers" and shall retain each pupil so transferred "until the completion of his elementary education." The transfer privilege must be permanent; otherwise the present condition will revert. If a substantial majority of the present student body at Lincoln plans to avail itself of this privilege, what shall become of the teachers already hired for the coming year? If in 1962, all the students decide to transfer, will Lincoln then have to be closed? But what if five years later a substantial number of students decide not to transfer? Presumably the trial court's Plan implicitly recognizes the right not to transfer. The Board would then be required to remove Lincoln from its moth-ball

fleet, return it to active duty, and re-stock it with teachers, janitors, and supplies.

Under this decree the 29 white children (Board statistics, Exh. N) would have the same right to transfer as the 454 non-white children. Assuming a repetition of the effect of the pre-1949 permissive transfer policy, probably a large percentage of the 29 whites would apply. Since the Board could not constitutionally discriminate between races the result would be (as in pre-1949 days) to increase the percentage of Negro children in Lincoln. Thus, for example, were 20 white children and 80 Negro children transferred, the percentage of Negro children would increase from 94% to approximately 98%.

The court's decree is clear. It reads "any child." There cannot be any significance to the court's deletion of the words "without regard to race, creed, color or national origin" from a somewhat similar provision in the Board's proposed plan. Although the court may override the judgment and discretion of the Board, surely it did not intend to nullify the Constitutions of the United States and the State of New York.

The "equal protection" rights of all the other school children of New Rochelle are completely disregarded. How can a permissive transfer policy be granted only to one out of twelve districts? Why should the Negro child in Mayflower, Columbus or Washington be deprived of the privileges granted to the Lincoln district? If concentration of any one group is "segregation" (and hence a constitutional violation), why should not the Jewish or Italian child be given equal privileges to transfer? If, as represented, Columbus is in a depressed economic area and over 90% Italian, is not the proper education of a child as important

to a resident of the Columbus district as the Lincoln district?

Regardless of protestations to the contrary, the effect and implications of the decision below are to place the operation of the schools of the country in the hands of the Federal courts or a single judge. His personal views as to those pupils who should be granted or denied transfer will control; he alone will decide what racial mixtures satisfy his concept of integration. Of necessity he will have to pass upon district lines if he chooses to permit neighborhood schools to continue. His decrees will cause schools to be built, altered or abandoned. Attendant thereto might even be an indirect fixing of the city's school tax rate to accomplish his bidding.

There will be those who will charge that these suggested possibilities are gross exaggerations and that "It Can't Happen Here." But if Federal courts undertake the operation, directly or indirectly, of the public schools, what will be the end result? Recent history has noted other government operations originally justified because business improved and the trains ran on time. In short, I believe that the decree takes away from the people, their duly elected or appointed Boards of Education, and from the States themselves their right to decide by democratic processes upon the educational policies for their communities.

In expressing these views, I am not unmindful, after reviewing the segregation cases from *Brown* v. *Board of Education* to date, that although "the responsibility for public education is primarily the concern of the States" that this responsibility "must be exercised consistently with federal constitutional requirements as they apply to state action." *Cooper* v.

Aaron, 358 U. S. 1, 19 (1958) and that "[T]he right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that is embraced in the concept of due process of law" (*Id.* p. 19). With these broad principles I am in complete accord. But the Constitution should not be a one-sided document. The comity which the judicial branch might well show towards the legislative and executive cannot be better stated than as expressed by Mr. Justice Frankfurter in *McGowan* v. *Maryand*, 6 L. Ed. 2d 393, 455 (1961):

> "Through what precise points in a field of many competing pressures a legislature might suitably have drawn its lines is not a question for judicial re-examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded."

The primary purpose of this action was to declare the neighborhood school policy unconstitutional because it resulted in racial imbalances in a school located in a predominantly Negro residential area. Discretion as to the drawing of district lines should be left to the various school Boards absent such unusual fact situations as existed in *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Clemons* v. *Board of Education of Hillsboro*, 6 Cir., 1956, 228 F. 2d 853.

But little comment need be made upon the majority opinion. Its conclusions can be explained in part by the obvious factual misconceptions on which they are based. Thus they say that "On January 11, 1949, the Board adopted a policy of refusing further transfers and of admitting new students only to the school of the district in which they reside." Nowhere, however, does the opinion attempt to show how this pre-1949

policy or the 1930 redistricting has any relevance to the situation at Lincoln in 1961. It is said that since 1949 the Board's actions have led to "a perpetuation and a freezing in" of a segregated condition. But what do "perpetuation" and "freezing in" mean in the context of constitutional prohibitions? And has not the majority—just as did the trial court through its use of such words as "over-rigid adherence," "intransigence," "inflexibility," and "maintained"—introduced, *sub silentio,* a revolutionary concept of State non-action into the Fourteenth Amendment?

In my opinion, the majority neither support nor condemn the neighborhood school policy but place their stamp of approval on the trial court's particular permissive transfer policy. Anomalously enough this very "permissive transfer policy," eliminated in 1949 to preserve a true "neighborhood school policy" so that the schools would accurately reflect the residential character of the neighborhood, is now acclaimed as the solution for the Lincoln School.

Affirmance of the trial court's plan is said to be "in accord with the principles stated in the *Brown* case." The *Brown* case can be searched in vain for its denials of equal protection, for discriminatory favors bestowed upon one group to the exclusion of others and for any mandate, direct or implied, that the Federal courts should take over the supervision and operation of the school systems throughout the United States. If this is to be its construction of its *Brown* decision that court should make it. Any extension as is now being made by the trial court and the majority here far beyond the bounds of *Brown,* should at least be premised upon some strong indication that the Supreme Court not only was decreeing non-segregation of white and Negro but also was decreeing en-

forced integration and compulsory racial mixtures according to Federal court formula in every city and hamlet of the country. Such thoughts should not be read into the decisions—or even into the minds—of others lightly.

There being no proof sufficient to sustain the allegations of the complaint, I would reverse and dismiss.

As to the decree of May 31, 1961, it denies, in my opinion, equal protection of the laws and is in derogation of the rights of the people of New Rochelle not to be subjected to discrimination because of race, color, creed, religion or national origin. I realize that, just as my views that pleadings still have a place and function in the law are exceedingly old-fashioned, my belief that the Constitution should apply equally to all our residents may be subject to the same criticism.

Because of the importance of this case to the people of New Rochelle and their Board of Education, I would grant a stay of the decree herein for 30 days to give the defendants an opportunity for such further appellate review as may be available to them in the event they decide to seek such relief.

Appendix B

Constitution of the United States

AMENDMENT XIV.

Portion of

Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

Exhibit "K"

(Emblem)

No. 6775

THE UNIVERSITY OF THE STATE OF NEW YORK

THE STATE DEPARTMENT OF EDUCATION

Before the Commissioner

IN THE MATTER

of the

Appeal of HALLIE TAYLOR, EVELYN BARTEE, DOROTHY TISDALE, BARBARA HALL and EULA WILLIAMS from the action of the BOARD OF EDUCTION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW ROCHELLE in relation to construction of a new school.

HAROLD F. HAMILTON, Esq.
Attorney for Appellants

HON. MURRAY C. FUERST,
Corporation Counsel
Attorney for Respondent

H. Hawthorne Harris, Victor Rabinowitz, Sidney Wolchok, I. Philip Sipser, Arthur Pulley, Esqs.

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Attorneys for

American Jewish Congress,
Pekelis Chapter of Westchester;

American Jewish Congress,
Women's Division of Westchester;

Catholic Interracial Council;

Interdenominational Ministers Alliance;

People's Committee;

Henry B. Herman, Leader,
Westchester Ethical Society;

New Rochelle Chapter of The National Association For the Advancement of Colored Peoples;

Committee for Integration in the New Rochelle Schools,
Amici Curiae.

This appeal is from a resolution adopted by the Board of Education of the City School District of the City of New Rochelle on November 30, 1959, proposing to build a new elementary school for Grades Kindergarten through 6 immediately adjacent to the site of the present Lincoln Elementary School.

Appellants claim that the attendance zone lines for this elementary school, as heretofore existing and as proposed to be substantially continued, have resulted and will result in making Lincoln School a segregated Negro school; that the educational opportunities of-

fered by the present Lincoln School are not equal to the facilities offered by other elementary schools in the district; that the physical condition of the Lincoln School endangers the health, lives and educational opportunities of the pupils attending there; and that the proposed site is undesirable for a number of reasons.

The City School District of the City of New Rochelle presently maintains 12 elementary schools, two junior high schools and one senior high school.

Both the single senior high school and the two junior high schools serve all pupils of the district, regardless of color, i.e., are completely integrated.

The percentage of Negro pupils enrolled in the elementary schools of the district according to the last survey (1958) was 0, .70, 4.43, 7.82, 14.72, 21.27, 22.60, 23.31, 26.67, 51.39 and 92.75. The last listed percentage is that for the said Lincoln Elementary School, while the immediately preceding figure is that for the Washington Elementary School, located directly to the south of the Lincoln School.

The board of education of this district, starting in 1948, has devoted a great deal of study and consideration to the problems of modernization and expansion of the total school plant, including the question of racial grouping as produced by changing residential patterns.

The record indicates that when Lincoln School was built over sixty years ago, it served a predominantly white area, which is now located in the center of the city. Throughout the years a steady increase of Negro residents occurred in this area.

Up to 1949 a rule was in effect under which pupils who wished to be transferred from the Lincoln School attendance zone to other schools in the area could do

so. Upon a complaint being brought to the board of education at that time, the board adopted a rule that the students residing in any attendance zone and entering school after the date of that resolution were thereafter required to attend the school of the district of residence. This policy has since been in effect. In 1954, the board of education employed a well-known firm of educational consultants to study the entire school plant problem, in supplementation to an earlier study made by another group in 1948. In 1955 the voluminous report of these consultants was submitted to the board, with recommendations. In 1957 the board had another report prepared, this time by a survey team of five professors from Columbia University and New York University, dealing with the question of racial imbalance in the district. Since that time two further reports and studies were made by Dr. Herbert C. Clish, the Superintendent of Schools of the district, both of which dealt directly with the problem of how to meet the racial imbalance represented by the high percentage of Negro students at Lincoln Elementary School. A great many proposals were made and considered, and all individuals and groups wishing to be heard were given an opportunity to present suggestions and proposals. In 1957 the board submitted to the voters of the district a group of proposals dealing with various school construction projects. Some of these projects, including one providing for a new elementary school in the Lincoln School district, were defeated by the voters at the polls. The final result was the resolution of the board of education here complained of, by which it is proposed to discontinue the use of the present Lincoln School and to replace it with a modern structure designed for 400 students, instead of the present

500 for which facilities are available in the present structure. The reduction is due to the desire of the board to make the most economical use of available space in adjacent school buildings. This is important because of the existence of constitutional tax and debt limitations to which this city school district is subject, as well as in the interest of the taxpayers of the district, whose approval is necessary for any bond resolution to be adopted by the board of education of this district which is to exceed a bond maturity of five years.

Appellants ask me to enjoin the board from all further proceedings toward the construction of a new Lincoln Elementary School on the present site, and to direct the board to choose a new site.

The Commissioner of Education may not interfere with any action taken by a board of education, unless such action violates a statutory or constitutional provision, or represents an abuse of statutory discretion (*Matter of Cogen*, 71 State Dept. Rpts. 60; *Matter of District No. 3, Town of Hempstead*, 73 id. 163; *Matter of Davis*, 75 id. 57).

In the words of Judge Levin (*Henry* v. *Godsell et al.*, 165 Fed. Supp. 83): "The fact that in a given area a school is populated almost exclusively by the children of a given race is not of itself evidence of discrimination." The question rather is whether or not "the standards observed were * * * * adopted as a device to circumvent the law."

The record before me, according to which approximately 62% of the Negro elementary students of this district attend schools other than the Lincoln School; according to which all students from the 7th Grade on attend completely integrated schools; and according to which for a number of reasons, as stated in the so-

called Dodson Report (the study made by the fac members from Columbia University and New Y University), "there is no ideal solution" to the colu School problem, does not indicate that the ac of the respondent board here complained of falls the prescribed category of cases such as *Matter Central School District No. 1, Town of Ramano* State Dept. Rpts. 106, or the *Clemons* case, 223 I 2nd 853, certiorari denied 350 U. S. 1006.

It must not be forgotten that the principle of established in *Brown* v. *Board of Education*, 347 U 483, is that no child may be denied admission t school on the basis of race or color. This principle only prohibits the maintenance of segregated scho against which the decision was directed, but also p hibits a board of education from denying admiss to a student to the school nearest his residence, mer because of his color, whether he be Negro or wh Every student is entitled to attend the school near his residence, unless there are just and compell reasons to send him elsewhere (*Pierce* v. *Union I trict School Trustees*, 46 NJL 76; see also *Matter U.F.S.D. #9, Town of Hempstead*, 71 State De Repts. 166).

My statement in *Matter of Bell* (77 State De Repts. 37) is apposite here:

> "Because of the incidence of location, the me fact that the preponderance of the children w would normally attend the neighborhood sch happened to be white or Negro, of Polish, Iri Scotch, Swedish, Italian or English descent otherwise or who espouse one religion or anoth does not require a board to attempt to gerr mander the lines, to assign but a certain pe centage to a particular school. This would co stitute as much discrimination as a gerryma

dered line to accomplish the opposite effect. The safety of the children, both white and Negro, is certainly a greater consideration than the claim made by these appellants that because there is a substantial predominance of Negroes in the Northeast School, that this will mitigate against their educational program."

It should also be emphasized that the record indicates that 87 percent of the responses made to a questionnaire sent out by the Lincoln School Parent-Teachers Association by parents of pupils attending the Lincoln School endorsed the board's proposal, as did 99 percent of those of non-parent citizens living in that district.

The issue here before me is not whether some other arrangement may constitute a better solution. The issue, as pointed out heretofore, is whether the board, after all its investigations and surveys, has been arbitrary in coming to the conclusion it did. Upon the record before me, I cannot find that the action of the respondent board, in determining to replace the Lincoln School with a modern structure and up-to-date facilities, constituted a reversible abuse of discretion.

THE APPEAL IS DISMISSED.

IN WITNESS WHEREOF, I, James E. Allen, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 20th day of May 1960.

(SEAL)

JAMES E. ALLEN, JR.
Commissioner of Education

Appendix D

Exhibit "B"

EXCERPT

of

MINUTES

of

BOARD OF EDUCATION
CITY OF NEW ROCHELLE, NEW YORK

Tuesday evening, January 11, 1949

The following resolution was duly moved, seconded and adopted:

RESOLVED, That the Board of Education study present district lines with a view to setting up school districts in terms of the best interests of all the children and of the most complete utilization of the present physical plant;
and be it further

RESOLVED, That as of September 1, 1949 district lines as set by the Board will be strictly adhered to according to best educational practices; and be it further

RESOLVED, That effective at once all new entrants to the school system be admitted only to the school of the district in which they legally reside.

Appendix E

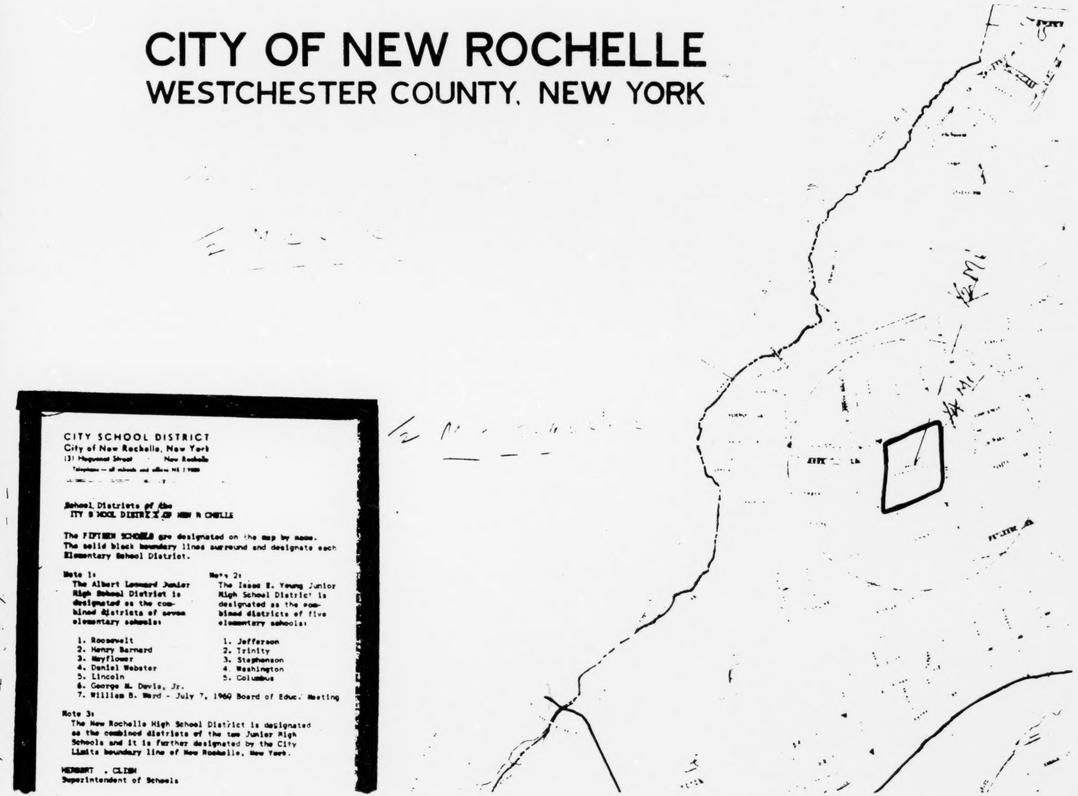
Exhibit "R"

City School District, City of New Rochelle, New York.

(PHOTOPRINT)

[For convenience of Court and Counsel this Exhibit is bound in on the opposite page.]

CITY OF NEW ROCHELLE
WESTCHESTER COUNTY, NEW YORK



CITY SCHOOL DISTRICT
City of New Rochelle, New York
(3) Huguenot Street New Rochelle

School Districts of the
ITY S HOOL DISTRI X OF NEW H CHELLE

The FIFTEEN SCHOOLS are designated on the map by name.
The solid black boundary lines surround and designate each
Elementary School District.

Note 1:
The Albert Leonard Junior High School District is designated as the combined districts of seven elementary schools:

1. Roosevelt
2. Henry Barnard
3. Mayflower
4. Daniel Webster
5. Lincoln
6. George M. Davis, Jr.
7. William B. Ward - July 7, 1960 Board of Educ. Meeting

Note 2:
The Isaac E. Young Junior High School District is designated as the combined districts of five elementary schools:

1. Jefferson
2. Trinity
3. Stephenson
4. Washington
5. Columbus

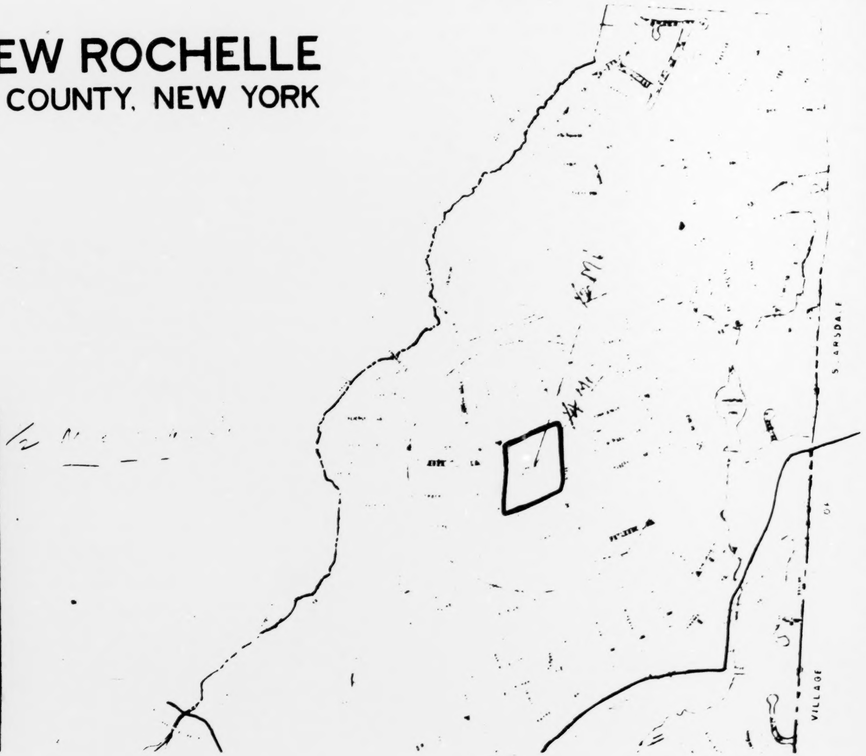
Note 3:
The New Rochelle High School District is designated as the combined districts of the two Junior High Schools and it is further designated by the City Limits boundary line of New Rochelle, New York.

HERBERT . OLSEN
Superintendent of Schools

Radius of Circle

EX. MAP

CITY OF NEW ROCHELLE
WESTCHESTER COUNTY, NEW YORK



CHOOL DISTRICT
ew Rochelle, New York
et Street New Rochelle

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OL DISTRI X OF NEW H CHELLE

HOOLS are designated on the map by name.
k boundary lines surround and designate each
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Note 2:
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tary schools:

The Isaac E. Young Junior High School District is designated as the combined districts of five elementary schools:

oosevelt
nry Barnard
yflower
niel Webster
ncoln
orge M. Davis, Jr.
illiam B. Ward - July 7, 1960 Board of Educ. Meeting

1. Jefferson
2. Trinity
3. Stephenson
4. Washington
5. Columbus

w Rochelle High School District is designated
combined districts of the two Junior High

½ Mile Radius

6. George M. Davis, Jr.
7. William B. Ward - July 7, 1960 Board of Educ. Meeting

Note 3:
The New Rochelle High School District is designated as the combined districts of the two Junior High Schools and it is further designated by the City Limits boundary line of New Rochelle, New York.

HERBERT . CLEIN
Superintendent of Schools

SIM JOE SMITH
Assistant Superintendent of Schools November 18, 1960

LEGEND

ELEMENTARY SCHOOL DISTRICT LINES

NORTH

½ Mi.

¼ Mi.

6. George M. Davis, Jr.
7. William B. Ward - July 7, 1960 Board of Educ. Meeting

Note 3:
The New Rochelle High School District is designated as the combined districts of the two Junior High Schools and it is further designated by the City Limits boundary line of New Rochelle, New York.

HERBERT . CLEIN
Superintendent of Schools

SIM JOE SMITH
Assistant Superintendent of Schools November 18, 1960

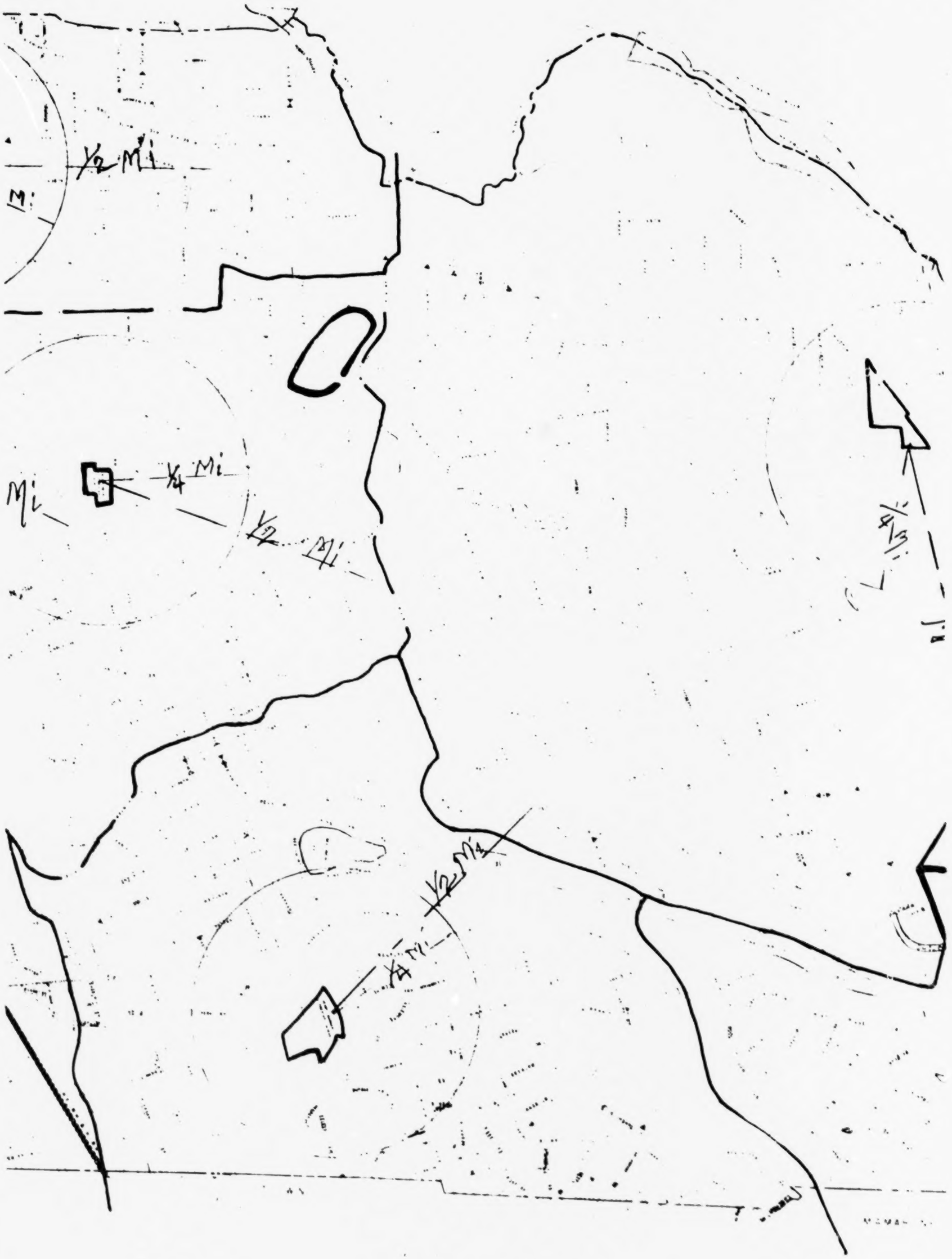
LEGEND

ELEMENTARY SCHOOL DISTRICT LINES

NORTH

½ Mi.

¼ Mi.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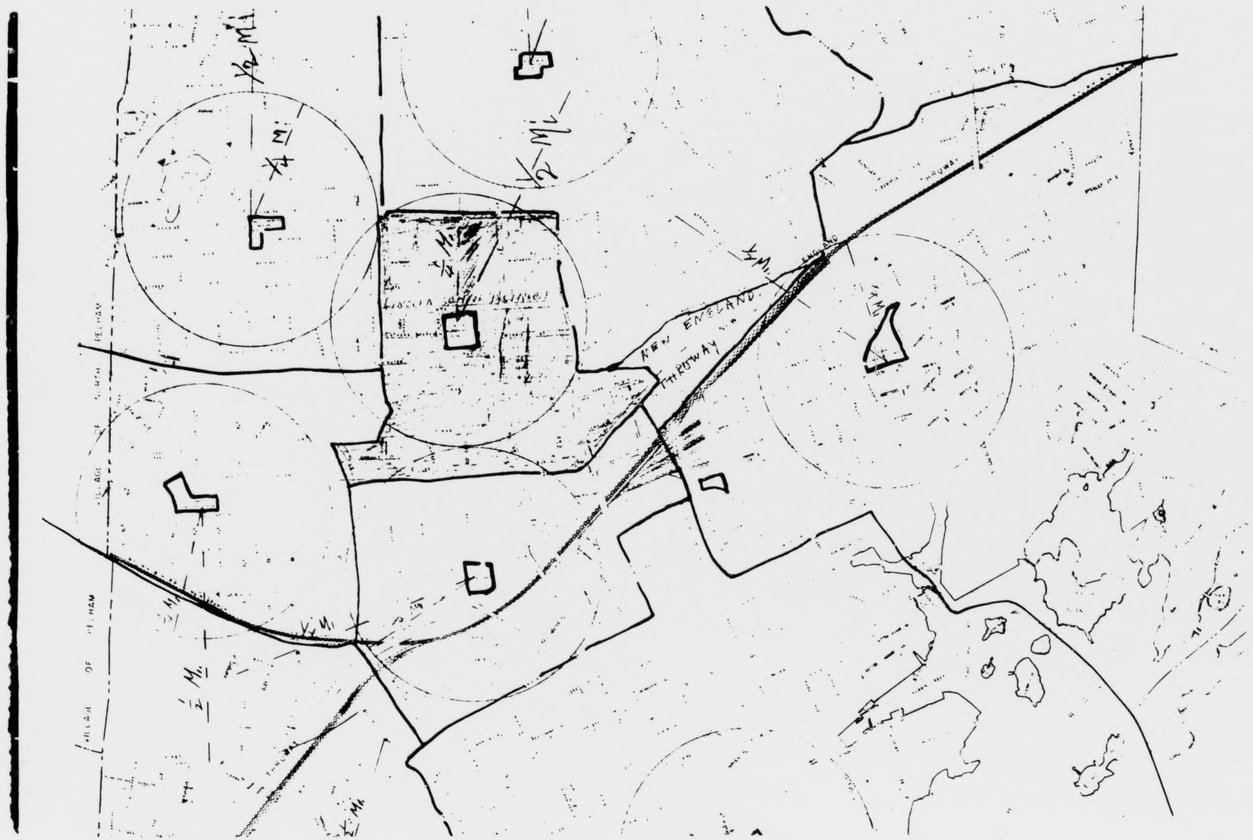
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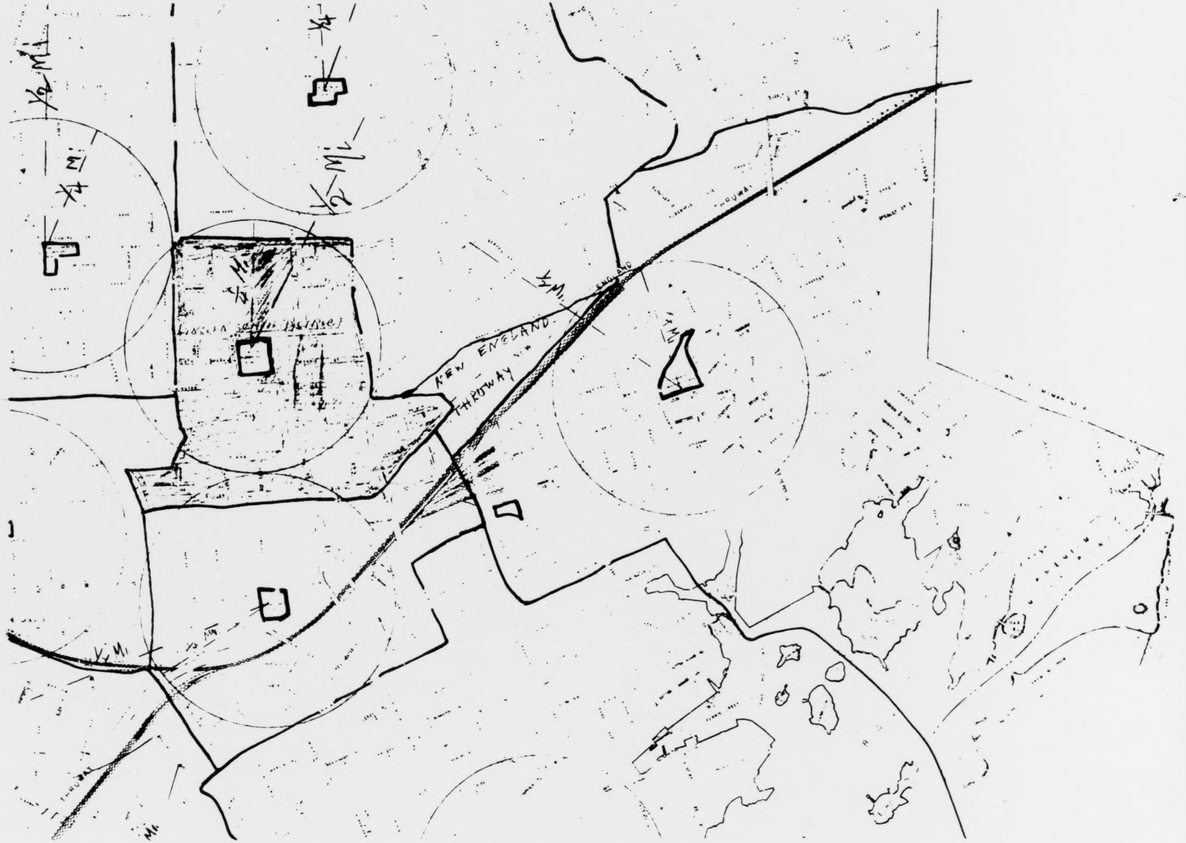
NEW ENGLAND
THRUWAY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NEW ENGLAND
THRUWAY

TRAVERS
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MANOR
CITY OF NEW

TRAVERS
ISLAND
MANOR
CITY OF NEW

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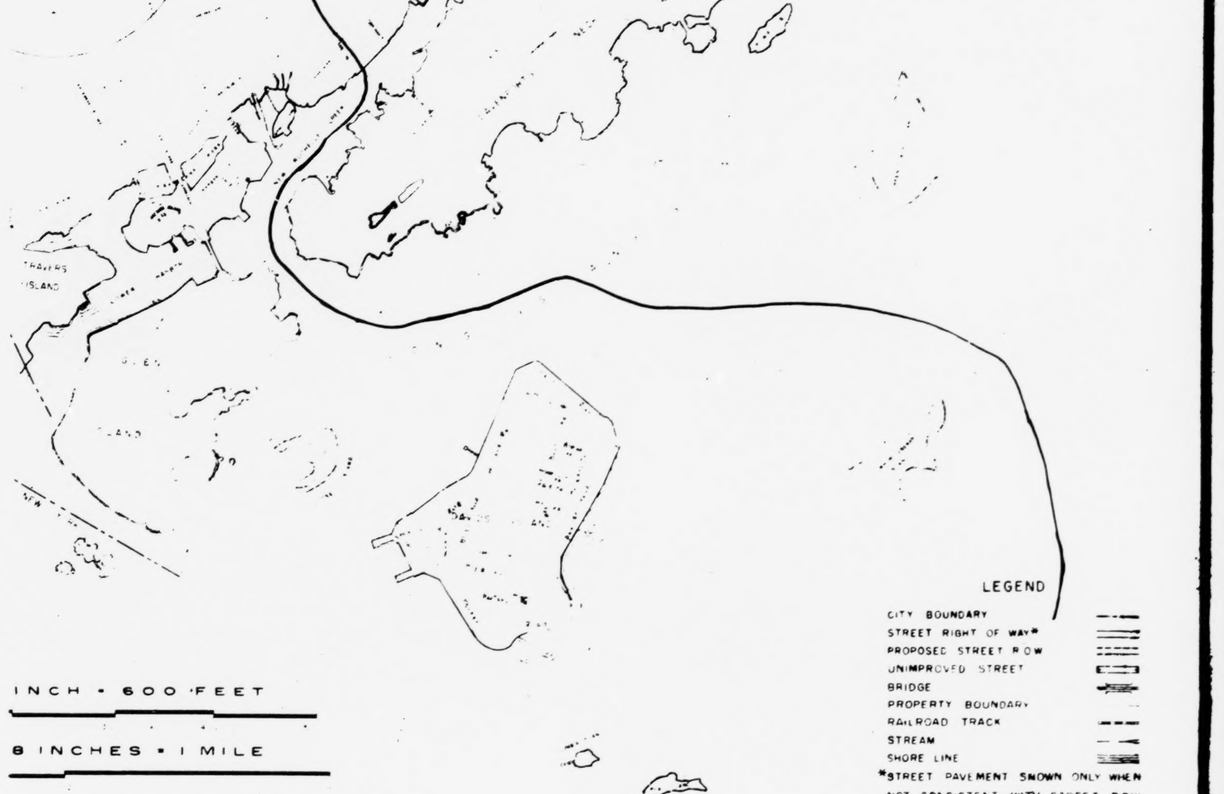
PROPOSED STREE
UNIMPROVED STR
BRIDGE
PROPERTY BOUN
RAILROAD TRACK
STREAM
SHORE LINE
*STREET PAVEMEN
NOT CONSISTENT
SCALE 1 INCH = 600 FEET
SCALE 88 INCHES = 1 MILE
PLANNING BOARD NOVEMBER 1955


LEGEND
CITY BOUNDARY
STREET RIGHT OF WAY*
PROPOSED STREET R.O.W.
UNIMPROVED STREET
BRIDGE
PROPERTY BOUNDARY
RAILROAD TRACK
STREAM
SHORE LINE
*STREET PAVEMENT SHOWN ONLY WHEN
NOT CONSISTENT WITH STREET ROW
INCH = 600 FEET
8 INCHES = 1 MILE
ARD NOVEMBER 1955